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In The

Supreme Court of the United States

OCTOBER TERM 1979

NELSON BUNKER HUNT, HERBERT HUNT, AND LAMAR HUNT,

Petitioners,

v.

COASTAL STATES GAS PRODUCING COMPANY, AND COASTAL STATES MARKETING, INC.,

Respondents.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX A

IN THE SUPREME COURT OF TEXAS

FROM HARRIS COUNTY FOURTEENTH DISTRICT

No. B-7984

NELSON BUNKER HUNT, et al,
Petitioners,

v.

COASTAL STATES GAS PRODUCING COMPANY,
Respondent

This suit was instituted by Nelson Bunker Hunt, Herbert Hunt and Lamar Hunt (Hunt) seeking damages against Coastal States Gas Producing Company and Coastal States Marketing, Inc. (Coastal States) for the alleged conversion of oil to which Hunt was entitled by virtue of a concession agreement with Libya. Coastal States counterclaimed for damages for Hunt's allegedly tortious interference with the contract and business opportunities of Coastal States. Both parties moved for summary judgment on the issue of liability after extensive development of the case. The trial court denied relief on all claims and the court of civil appeals affirmed. 570 S.W. 2d 503. We affirm the judgment of the court of civil appeals.

In 1957 the Government of Libya granted Hunt a concession which gave him the right, for fifty years, to explore, drill and extract oil in an area now identified as the Sarir field.

Hunt assigned a one-half undivided interest in this concession to British Petroleum Exploration Company, Ltd. (British Petroleum) in 1960. Oil was discovered in the concession area in 1961 and, by 1967, it was produced in marketable quantities. In September 1969, Colonel Mu'ammar al-Qadhafi assumed power in Libya under a new government, the Revolutionary Command Council, and commenced making changes in the existing contractual relations with the various oil producers holding concession agreements with Libya. In 1971, the Libyan Government nationalized the operations and interest of British Petroleum in the Sarir field and transferred its rights to the Arbian Gulf Exploration Company (AGECO). AGECO is a corporation whose entire capital stock is owned by the Libyan Government.

On June 20, 1973, by Libyan Law No. 42 of 1973, the Libyan Government nationalied all the rights and assets of Hunt in the concession agreement and assigned these rights to AGECO. Although Libya agreed to pay compensation, the amount was to be determined by a committee designated by the State. In response to this action, Hunt published notices in newspapers throughout the world claiming that the Libyan nationalization violated international law and threatened suit against anyone who came into possession of Sarir oil. In May 1973, Coastal States entered into a contract with AGECO to purchase oil from the Sarir field and it continued to purchase oil under this contract despite Hunt's claims against Libya and threatened suits. This oil was transported by Coastal States to a refinery in Italy where it was processed and sold to third parties. It was stipulated that a portion of the products derived from this oil was subsequenly taken to the United States, although it was not stipulated that Coastal States transported or caused any of such products to be brought here. Nevertheless, Coastal States is domiciled in the United States and, at least, the net

proceeds derived from the Sarir oil were brought here and are the basis of Hunt's suit for conversion.

British Petroleum was a party to the controversy with Coastal States at one time, but it subsequently entered into a full settlement with the Libyan Government after arbitration of its claim and it does not now assert any claim against Coastal States[1] In May 1975 Hunt entered into a settlement agreement with the Libyan government whereby, for the sum of approximately $19,000,000, it released any and all claims against the Libyan Government arising out of the nationaliation of the Sarir field. Coastal States was not a party to this agreement and Hunt now seeks to recover the proceeds realized by Coastal States from oil allegedly purchased from AGECO prior to the May 1975 settlement.

Both the trial court and the court of civil appeals concluded that the trial court was foreclosed from inquiring into the validity of the Libyan nationalization of Hunt's interest in the Sarir field by the Act of State Doctrine. These courts further concluded that as a matter of law, Hunt's actions in giving notice of his claim to oil from the Sarir field did not violate either state or federal law and would not support Coastal States' claim for damages for tortious interference. Hunt and Coastal States both filed applications for writ of error and complain of the take-nothing judgment entered on the claim of each.

APPEAL BY HUNT

Hunt's claim against Coastal States is necessarily based upon the assertion that Libya's expropriation was invalid so that Coastal States acquired no title from AGECO. The critical question involved in Hunt's appeal is the applicability

[1] The arbitrator held that Hunt did not acquire title to the oil in the strata.

of the Act of State Doctrine and more precisely, whether Hunt's suit comes within the exception to the doctrine created by the Hickenlooper Amendment, 22 U.S.C. § 2370(e) (2). The lower courts have held that the doctrine bars inquiry by a Texas court into the validity of acts done by a foreign sovereign.

The Act of State Doctrine is a judicially created doctrine of restraint. The landmark case of *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964) reaffirmed the doctrine as originally articulated in *Underhill v. Hernandez*, 168 U.S. 250 (1897) in the following language:

> "Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves."

In *Sabbatino* it was stated that the doctrine "arises out of the basic relationships between branches of government in a system of separation" and the courts prior recognition of the doctrine "expresses the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder rather than further this country's pursuit of goals both for itself and for the community of nations as a whole in the international sphere."

In *Hunt v. Mobil Oil Corp.*, 550 F.2d 68 (2d Cir. 1977), *cert. denied*, 434 U.S. 984, the Act of State Doctrine was held to bar Hunt's inquiry into the validity of Libya's nationalization of Hunt's concession. In holding that the trial court properly dismissed Hunt's claim against seven major

oil producers in the Persian Gulf area for damages under the anti-trust statute, the circuit court said:

> "We conclude that the political act complained of here was clearly within the act of state doctrine and that since the disputed pleadings inevitably call for a judgment on the sovereign acts of Libya the claim is non-justiciable."

This final judgment against Hunt in that case controls his present suit for conversion unless it comes within the exception to the Act of State Doctrine created by the Hickenlooper Amendment. *Benson v. Wanda Petroleum Company*, 468 S.W. 2d 361 (Tex. 1971).

The Hickenlooper Amendment was enacted by Congress in 1964 shortly after the *Sabbatino* holding and in obvious reaction to it. It provides in part:

> "[N]o court in the United States shall decline on the ground of the federal act of state doctrine to make a determination on the merits giving effect to the principles of international law in a case in which a CLAIM OF TITLE OR OTHER RIGHT TO PROPERTY is asserted by any party including a foreign state . . . based upon (or traced through) a confiscation or other taking . . . by an act of that state in violation of the principles of international law . . . ." (Emphasis Added)

22 U.S.C. § 2370(e) (2). It must be recognized at the outset that this exception which was adopted over the objections of the Executive Department of the United States has been narrowly construed by our courts. *Occidental of Umm Al Qay., Inc. v. Cities Serv. Oil Co.*, 396 F. Supp. 461, *aff'd in part*, 577 F.2d 1196 (5th Cir. 1978), *petition for cert. filed*, 47 U.S.L.W. 3422 (U.S. Dec. 6, 1978) (No. 78-910); *Occidental Petroleum Corp. v. Buttes Gas & Oil Co., Co.*, 331 F.

Supp. 92, *aff'd*, 461 F.2d 1261 (9th Cir. 1972), *cert. denied*, 409 U.S. 950; *United Mexican States v. Ashley*, 556 S.W. 2d 784 (Tex. 1977).

The statute enumerates three requirements which must exist in order to avoid the Act of State Doctrine under the Hickenlooper Amendment. 1. Expropriated property must come within the territorial jurisdiction of the United States. 2. The act of the expropriating nation must be in violation of international law. 3. The asserted claim must be a claim of title or other right to property. 22 U.S.C. § 2370(e) (2). The court of civil appeals concluded, without consideration of the first two requirements, that the Hickenlooper Amendment is not applicable to this case because Hunt acquired only a contract right by the agreement with Libya. We agree with this conclusion and therefore limit our consideration to the third requirement stated above.

Since Libya is both the place of the contract's execution and performance as well as the location of the subject matter, Libyan substantive law governs the interpretation and construction of the rights conferred to Hunt by the Concession Agreement. *Cantu v. Bennett*, 39 Tex. 304 (1873).

The Concession Agreement expressly provides that the applicable law is the Libyan Petroleum Law No. 25 of 1955 and this law provides in part:

> "(1) All petroleum in Libya in its natural state in strata is the property of the Libyan State.
>
> "(2) No person shall explore or prospect for, mine or produce petroleum in any part of Libya, unless authorized by a permit or concession issued under this Law."

The expressed intent of the Concession Agreement was to grant Hunt the *right* to search for and to extract oil within

the defined area for the stated term[2]. It did not grant Hunt title to the oil in the strata. Under Libyan law, title to the oil passed at the wellhead. In 1966 Hunt and Libya voluntarily amended the 1957 Concession Agreement. Clause 16 of the amended agreement states:

> "(1) The Government of Libya will take all the steps necessary to ensure that the Company enjoys all the rights conferred by the Concession. The CONTRACTUAL RIGHTS expressly created by this concession shall not be altered except by mutual consent of the parties.
>
> "(2) This Concession shall throughout the period of its validity be construed in accordance with the Petroleum Law and the Regulations in force on the date of the execution of the agreement of amendment by which this paragraph (2) was incorporated into this concession agreement. Any amendment to or repeal of such Regulations shall not affect the CONTRACTUAL RIGHTS of the Company without its consent." (Emphasis added)

This language is significant in that it not only refers to Hunt's rights as "contractual," but it also recognizes Libya's ownership of the oil. We conclude that Hunt obtained only a contractual right under the Concession Agreement.

The Hickenlooper Amendment by its express terms applies only to a claim of title or other right to property. This construction was made abundantly clear in 1965 when Congress added the words "to property" following the phrase "claim of title or other right." Thus this exception to the Act of State Doctrine has no application here where only a contractual right was expropriated from Hunt. *See Occidental of Umm Al Qay., Inc. v. Cities Serv. Oil Co., supra;*

[2] The Concession Agreement provides that the designated area may be reduced at stated intervals during the fifty year term.

French v. Banco Nacional de Cuba, 242 N.E. 2d 704 (N.Y. 1968); *Menendez v. Saks and Company*, 485 F.2d 1355 (2nd Cir. 1973), *cert. denied*, 425 U.S. 991 (1976); *Present v. U. S. Life Ins. Co.*, 232 A.2d 863, *aff'd*, 241 A.2d 237 (N.J. 1968). We have been cited to no case, and have discovered no case, holding to the contrary.

The trial court and the court of civil appeals did not err in concluding that the Act of State Doctrine bars judicial inquiry into the validity of Libya's actions.

APPEAL BY COASTAL STATES

We agree with the holding of the court of civil appeals that Hunt's motion for summary judgment was properly granted on Coastal States' claim of tortious interference with business contracts and business relations. Hunt's contractual rights in the Sarir field were expropriated by Libya and Hunt was fully justified in apprising the international community of his intent to file suit if they dealt with oil from this field.

The judgment of the court of civil appeals is affirmed.

Charles W. Barrow, Justice

Dissenting Opinion by Justice Steakley, joined by Chief Justice Greenhill and Justice Spears.

Opinion Delivered: June 13, 1979

APPENDIX B

IN THE SUPREME COURT OF TEXAS

No. B-7984

NELSON BUNKER HUNT, HERBERT HUNT AND LAMAR HUNT,
Petitioners,

v.

COASTAL STATES GAS PRODUCING COMPANY AND COASTAL STATES MARKETING, INC.,
Respondents.

DISSENTING OPINION

I respectfully dissent.

This is an appeal from two summary judgments. Nelson Bunker Hunt, Herbert Hunt, and Lamar Hunt (hereinafter referred to as "Hunt") sued Coastal States Gas Producing Company and Coastal States Marketing, Inc., (hereinafter referred to as "Coastal States"). Hunt sought judgment "against Coastal States awarding them possession of an undivided one-half of all crude oil or oil products produced from Concession 65 (the Sarir Field) and converted by Coastal States and its assignees, or the proceeds thereof; or, in the event that such crude oil, oil products or proceeds have been commingled with the property of another, for an undivided interest in such property in proportion to their shares of commingled oil, products, or proceeds; or, alternatively, for the fair market value of all such crude oil or oil products converted by Coastal States and its assignees to

date of judgment; for an accounting by Coastal States as to the amount of crude oil produced from Concession 65 taken by it or its assignees, the amount of oil products taken by Coastal States and its assignees derived from such crude oil, the consideration received by Coastal States or its assignees for such oil or oil products, and any other matters proper to such accounting; together with exemplary damages, interest, costs of Court and general relief." Coastal States filed a counterclaim alleging tortious interference with its contract and business opportunities. The trial court granted the motion for summary judgment filed by Coastal States against Hunt's suit, and the motion for summary judgment filed by Hunt against Coastal States' suit. The Court of Civil Appeals affirmed. 570 S.W. 2d 503. I would reverse the summary judgment in Hunt's action against Coastal States, sever this claim and remand it for trial.

In 1957, the Government of Libya granted Concession Number 65 to Hunt, granting him the right to explore for, drill and extract oil for fifty years in the area hereinafter referred to as the Sarir field. In 1960, Hunt assigned a one-half undivided interest in that concession to British Petroleum Exploration Company, Limited. Oil was discovered in the Sarir field in 1961, and was produced in marketable quantities by 1967. In 1971, Libya nationalized the interest of British Petroleum in the Sarir field and transferred British Petroleum's interest to the Arabian Gulf Exploration Company (AGECO). Two years later, by enactment of Libyan Law Number 42, Libya nationalized Hunt's interest in the concession without compensation. Hunt's rights and assets were then transferred to AGECO. Hunt published notices throughout the world that the Libyan nationalization of the Sarir field violated international law and threatened suit against anyone who came into possession of oil from the Sarir field. Coastal States entered into a contract with

AGECO to purchase oil from the Sarir field at approximately the time the nationalization decree was issued, and first received oil from the Sarir field in May, 1973. Coastal States transported that oil to refineries in Italy and sold the processed products to third parties. The proceeds of these sales accrued to Coastal States, which is incorporated and headquartered in the United States. Coastal States also stipulated that at least a portion of such products were brought into the United States from the refineries in Italy.

In August, 1973, Hunt brought this suit against Coastal States, British Petroleum, originally a co-plaintiff in the suit, took a nonsuit after entering into a settlement with Libya that released Libya and all third parties, thus ending all its claims in regard to oil from the Sarir field.

In May, 1975, Hunt settled his claims against the Libyan government for the nationalization of the Sarir field. Hunt and Coastal States stipulated that Libya's payment of approximately $19,000,000 for that agreement represented only the net book value of Hunt's physical assets located on Concession 65 and "that no portion of such sum was for oil previously sold by AGECO or for oil in place." Hunt's present suit seeks an adjudication with respect to a one-half share of the oil purchased by Coastal States from the date of the expropriation in May, 1973, to the date of Hunt's settlement with Libya in May, 1975.

In Hunt's suit against Coastal States, he alleged that the expropriation by Libya was an illegal confiscation and therefore did not affect his rights to recover against subsequent converters of the oil from the Sarir field. Hunt claimed that Coastal States acquired the oil with full knowledge of Hunt's contrary possessory rights, title and interest. A pre-trial hearing was held with each party calling experts in international and foreign law who expressed their opinions re-

garding the application of Libyan and international law to the facts of this case. The parties thereafter submitted the motions for summary judgment discussed above.

I. THE ACT OF STATE DOCTRINE

I would hold that the Hickenlooper Amendment, 22 U.S.C. § 2370(e)(2), a statutory exception to the act of state doctrine, is applicable to Hunt's claim and directs a judicial determination on its merits.

The act of state doctrine was articulated in *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897): "Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory." This doctrine was reaffirmed in the landmark case *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964). The Hickenlooper Amendment was enacted in reaction to *Sabbatino* and was meant to overrule, in part, that decision. I shall therefore examine *Sabbatino* in some detail.

Sabbatino involved a dispute over the proceeds from a shipload of sugar expropriated by Cuba. Farr, Whitlock & Company had contracted to purchase the sugar from the Cuban subsidiary of an American owned firm, C.A.V. All assets of C.A.V. were nationalized after the sugar that was destined for Morocco had been loaded on the ship, but before the ship had left Cuban waters. Farr, Whitlock & Company had to sign duplicate contracts pledging payment to an instrumentality of the Cuban Government in order to obtain permission for the ship to sail.

Subsequently, Cuba's agent in New York, Banco Nacional, and C.A.V. both made demand on Farr, Whitlock & Company for payment for the sugar. Farr, Whitlock & Company refused payment to Cuba's agent. Instead, pursuant to court order, it delivered the funds to Sabbatino, the Temporary Receiver for C.A.V.'s New York assets, to await judicial determination of ownership. Banco Nacional brought suit against Farr, Whitlock & Company, alleging conversion of the fund. The district court dismissed the suit. The Second Circuit Court of Appeals affirmed, holding that the expropriation decree violated international law and therefore did not transfer good title to Banco Nacional. The United States Supreme Court reversed and remanded, holding that the act of state doctrine precluded examination of the validity of the Cuban expropriation. The way was thus cleared for an American court, by refusing to look at the validity of Cuba's expropriation, to validate that expropriation by rendering judgment requiring Farr, Whitlock & Company to pay the proceeds to the last party having possession of the sugar.

The Court examined the foundations of the act of state doctrine and concluded that the doctrine is not compelled by the inherent nature of sovereign authority, by any principle of international law, or by the United States' Constitution. 376 U.S. at 421-23. Rather, the doctrine "arises out of the basic relationships between branches of government in a system of separation of powers. It concerns the competency of dissimilar institutions to make and implement particular kinds of decisions in the area of international relations." *Id.* at 423. Finally, the Court reasoned that a judicial determination as to the validity of an expropriation by a foreign sovereign within its own territory would have only an occasional impact, would often be likely to offend the expropriating country, and would be a potential source of embarrassment to the Executive Branch in its conduct of possible negotiations with the expropriating country. *Id.* at 431-33. There-

fore, as a matter of judicial restraint, the act of state doctrine was applied to preclude inquiry into the validity of this expropriation.

The dissent protested the extension of the act of state doctrine to actions of foreign sovereigns that violate international law.[1] Courts of the United States have long recognized a duty to determine controversies on their merits, according to the applicable law which includes international law.[2] Our courts have never been required to pay unlimited deference to foreign acts of state. The Courts of other nations do not follow such an inflexible rule in the protection of their Executive Branch. Furthermore, the adoption of such an inflexible

[1] 376 U.S. at 442-44, n.2, discusses earlier cases invoking the act of state doctrine, showing that those cases did not involve violations of international law.

[2] U.S. CONSTI. art III, § 2, extends the judicial power "to Controversies . . . between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."

Hilton v. Guyot, 159 U.S. 113, 163 (1895) declared that:

> *International law*, in its widest and most comprehensive sense — including not only questions of right between nations, governed by what has been appropriately called the law of nations; but also questions arising under what is usually called private international law, or the conflict of laws, and concerning the rights of persons within the territory and dominion of one nation, by reason of acts, private or public, done within the dominions of another nation — *is part of our law, and must be ascertained and administered by the courts of justice*, as often as such questions are presented in litigation between man and man, duly submitted to their determination.
>
> The most certain guide, no doubt, for the decision of such questions is a treaty or a statute of this country. But *when, as is the case here, there is no written law upon the subject, the duty still rests upon the judicial tribunals of ascertaining and declaring what the law is*, whenever it becomes necessary to do so, in order to determine the rights of parties to suits regularly brought before them. In doing this, the courts must obtain such aid as they can from judicial decisions, from the works of jurists and commentators, and from the acts and usages of civilized nations. (Emphasis added).

rule is likely to cause as much embarrassment to the Executive Branch as an adjudication on the merits.

The Hickenlooper Amendment was enacted before the district court had entered judgment on remand. Subsequent to such enactment, the district court, in *Banco Nacional de Cuba v. Farr*, 243 F.Supp. 272 F.Supp. 836 (1965), held that the amendment applied to that case; held that the expropriation by the Cuban government violated international law; and dismissed the suit. The Second Circuit Court of Appeals affirmed, 383 F.2d 166 (1967), holding that the Hickenlooper Amendment did apply, that the amendment was constitutional, and that the Cuban expropriation violated international law. The Court of Appeals adopted a considerable portion of its prior determination in the case, 307 F.2d 845 (1962). The United States Supreme Court thereafter denied petition for certiorari in the case, 390 U.S. 956 (1968).

II. THE HICKENLOOPER AMENDMENT

In the wake of reaction against *Sabbatino*, Congress passed the Hickenlooper Amendment. It became law on October 7, 1964, and was reenacted as permanent law in 1965. It reads as follows:

> Notwithstanding any other provision of law, no court in the United States shall decline on the ground of the federal act of state doctrine to make a determination on the merits giving effect to the principles of international law in a case in which a claim of title or other right to property is asserted by any party including a foreign state (or a party claiming through such state) based upon (or traced through) a confiscation or other taking after January 1, 1959, by an act of that state in violation of the principles of international law, including the principles of compensation and the other standards set out in this subsection: *Provided*, That this subpara-

> graph shall not be applicable (1) in any case in which an act of a foreign state is not contrary to international law or with respect to a claim of title or other right to property acquired pursuant to an irrevocable letter of credit of not more than 180 days duration issued in good faith prior to the time of the confiscation or other taking, or (2) in any case with respect to which the President determines that application of the act of state doctrine is required in that particular case by the foreign policy interests of the United States and a suggestion to this effect is filed on his behalf in that case with the court.

22 U.S.C. § 2370(e) (2).

The Senate Report indicates that the amendment was meant to modify the *Sabbatino* decision and to achieve a reversal of presumptions as to the embarrassment caused the Executive Branch by judicial determinations on the merits of controversies that involve an act of state by a foreign sovereign.[3] Under *Sabbatino*, courts were required to refuse adjudication of claims that involved passing on the validity of a foreign country's act of state, presuming that such an adjudication would embarrass the Executive's conduct of foreign policy. The Hickenlooper Amendment directs that courts shall adjudicate such claims, presuming that such an adjudication will *not* embarrass the Executive. This presumption may be rebutted if the President determines that

[3] The amendment is intended to reverse in part the recent decision of the Supreme Court in *Banco de Nacional de Cuba v. Sabbatino*. The act of state doctrine has been applied by U. S. courts to determine that the actions of a foreign sovereign cannot be challenged in private litigation. The Supreme Court extended this doctrine in the *Sabbatino* decision so as to preclude U.S. courts from inquiring into acts of foreign states, even though these acts had been denounced by the State Department as contrary to international law.

S. Rep. No. 1188, Part I, 88th Cong., 2d Sess. 24 (1964).

application of the act of state doctrine is required in a particular case by United States' foreign policy interests.[4]

Under the Hickenlooper Amendment, any court in the United States must determine the merits of controversies if (1) any party makes a claim of title or other right to property based upon or traced through a confiscation or taking, (2) the President has not filed with the court a suggestion that the application of the act of state doctrine is required by the foreign policy interests of the United States,[5] and (3) that taking was by a foreign state in violation of the principles of international law. The amendment further directs that the determination be made "giving effect to the principles of international law." Despite the majority's assertion to the contrary, the statute does not require that the expropriated property itself be brought within the territorial jurisdiction of the United States. The amendment does apply

[4] Under the *Sabbatino* decision, the courts would presume that any adjudication as to the lawfulness under international law of the act of a foreign state would embarrass the conduct of foreign policy unless the President says it would not. Under the amendment, the Court would presume that it may proceed with an adjudication on the merits unless the President states officially that such an adjudication in the particular case would embarrass the conduct of foreign policy.

Id.

This is similar to the procedure followed by the Department of State currently regarding sovereign immunity claims. That Department makes a determination whether foreign governments' claims of immunity should be granted in each case where a party seeks to raise the immunity issue. See *Sabbatino*, 376 U.S. at 469; 26 DEPT. STATE BULL. 984-985 (1952), Appendix 2, *Alfred Dunhill of London, Inc. v. Cuba*, 425 U.S. 682, 711-15 (1976).

[5] The *Proviso* clause of the amendment also exempts its application "in any case . . . with respect to a claim of title or other right to property acquired pursuant to an irrevocable letter of credit of not more than 180 days duration issued in good faith prior to the time of the confiscation or other taking."

to the proceeds of such property.[6] The Hickenlooper Amendment has been narrowly construed by the courts and has been restricted to fact situations closely in point to *Sabbatino*. I would hold that the case at bar is in that class of cases encompassed by the amendment and that our courts are under a duty to make a determination on the merits of this controversy.

A. Claim of title or other right to property.

The majority has concluded that, under Libyan law, Hunt does not have title to oil in strata, but only has a contract right to that oil, and that therefore he has no claim to property as required by the Hickenlooper Amendment. I disagree. The Hickenlooper Amendment does not require proof

[6] Although the amendment does not refer specifically to proceeds, it is clear that it was intended to apply to the property as long as it is traceable. The *Sabbatino* case itself involved the proceeds of the expropriated property. The shipment of sugar never came within the territorial jurisdiction of the United States.

Testimony before legislative committees during consideration of the amendment further reflects this understanding. Professor Louis Henkin, Columbia University Professor of International Law, who testified against the amendment stated: "I do not think it would apply except to property which was itself expropriated in violation of international law; or to that property so long as it is still identifiable; one might change its form somewhat and still identify it." *Foreign Assistance Act of 1965, Hearings on H.R. 7750 Before the House Committee on Foreign Affairs*, 89th Cong., 1st Sess. Part VII, 1070 (1965). Professor Cecil J. Olmstead stated "This [amendment] is designed to go after the property or proceeds of specific property that was illegally taken by the foreign state." *Id.*, Part IV, 610.

The cases also reflect the understanding that the Hickenlooper Amendment applies to proceeds of the property expropriated. "We must thus attempt to identify the 'property' — or the proceeds of such property — which was allegedly 'confiscated or taken' from Ritter by the action of the Cuban Government." *French v. Banco Nacional de Cuba*, 23 N.Y.2d 46, 58, 242 N.E.2d 704, 295 N.Y.S. 2d 433 (1968). See *Banco Nacional de Cuba v. First National City Bank of New York*, 431 F.2d 394, 401-02 (2nd Cir. 1970); *Banco Nacional de Cuba v. Farr*, 383 F.2d 166 (2nd Cir. 1967).

of title to property; it requires adjudication of controversies when "a claim of title *or other right* to property *is asserted*." (Emphasis added). The amendment also requires that the determination be made giving effect to the principles of international law, not according to the law of the country that has just accomplished the confiscation.

Significance has been attached to Congress' addition of the words "to property" after the phrase "a claim of title or other right" when it reenacted the amendment and made it permanent in 1965. A close reading of the legislative history surrounding the adoption of this amendment makes it clear that these words were added to assure the availability of the act of state doctrine as a defense in certain cases where American banks, insurance companies, and other financial institutions that have had reserves expropriated abroad might otherwise be susceptible to multiple liability.[7]

[7] In 1964, the Hickenlooper Amendment was adopted as a temporary law with the understanding that it would be further considered the following year. In 1965, after additional hearings, the Amendment became permanent law as part of the Foreign Assistance Act of 1965. Two significant changes were made. First, as noted, it was made permanent law. Second, the words "to property" were added as described above. The purpose of that addition was explained in the Senate Report:

> The words "to property" have been inserted to make it clear that the law does not prevent *banks, insurance companies, and other financial institutions* from using the act of state doctrine as a defense to multiple liability upon any contract or deposit or insurance policy in any case where such liability has been taken over or expropriated by a foreign state. In such cases, it is not intended to effect any defense previously available to such institutions. (Emphasis added).

S. Rep. No. 170 on S. 1837, 89th Cong., 1st Sess. 19 (1965).

The change was also explained during testimony before the House by Professor Cecil J. Olmstead, Professor of International Law at the New York University School of Law, 1965 President of the American Branch of the International Law Association, as-

(Continued on next page)

This does not preclude the applicability of the amendment to cases where a contract has granted a party a claim of title or other right to certain tangible property that has been the subject of expropriation by a foreign sovereign. Furthermore, it has long been recognized that contract rights are a form of property protected by the Fifth Amendment. See *United States Trust Co. v. New Jersey*, 431 U.S. 1, 19, n. 16 (1977).

The legislative history indicates that the case at bar presents precisely the type of claim that was contemplated by Congress in the passage of the Hickenlooper Amendment. Professor Cecil Olmstead, one of the original authors of the amendment, expected the amendment to apply to contract rights when tangible property or goods claimed under a contract, or proceeds thereof, came into the United States:

> I would think that a contract right would [be covered] because there is a property interest in the contractual right of course. We certainly intended a contractual right would be covered here.
>
> Of course, if there was a violation of a contract between a U.S. investor and a foreign state and no proceeds or goods or commodity from the enterprise came into the United States, there would never be an opportunity for this amendment to work.

(Continued from preceding page)

sistant to the Chairman of the Board of Texaco, Inc., and one of the original authors of the amendment, speaking on behalf of the Rule of Law Committee:

> [T]he amendment has been so drafted as not to affect the act of state doctrine defense when it is asserted by a party which does not derive a claim of title or right through an expropriation (e.g., U.S. bank defending a suit by depositors in a foreign branch that was expropriated or a U.S. insurance company defending a suit on foreign policies backed by reserves that were expropriated abroad).

Foreign Assistance Act of 1965: Hearings on H.R. 7750 Before the House Committee on Foreign Affairs, 89th Cong., 1st Sess. Part IV, 593 (1965).

Foreign Assistance Act of 1965, Hearings on H.R. 7750 Before the House Committee on Foreign Affairs, 89th Cong., 1st Sess., Part IV, 608 (1965).

Congressman Adair, sponsor of the original amendment in the House, explained its purpose in this manner:

> [The amendment] insures that however the case may arise or the act of state doctrine be invoked, a party who had suffered an expropriation in violation [of international law] may bring suit to assert his claim to the expropriated property if there is an attempt to market it in the United States.

110 CONG. REC. 23680 (1964).

Even an opponent of the amendment, Professor Louis Henkin, admitted its applicability to this type of situation. In a letter submitted in response to a request during his testimony prior to the amendment's reenactment, Henkin stated:

> So far as the *Sabbatino* amendment is concerned, it would apply also to expropriations of property owned by nationals of third countries. The famous expropriation by Iran of the Anglo-Iranian Oil Co. is a notable example. *Presumably, if some of that oil had come to the United States, the British company might have traced it here and, under the Sabbatino amendment, an American court would have had to decide whether the nationalization program of the Government of Iran was consistent with international law.* (Emphasis added).

Foreign Assistance Act of 1965, Hearings on H.R. 7750 Before the House Committee on Foreign Affairs, 89th Cong., 1st Sess., Part VII, 1076 (1965).

As recognized by the Second Circuit Court of Appeals in *Banco Nacional de Cuba v. First National City Bank of New*

York, 431 F.2d 394, 402 (2d Cir. 1970), after studying the legislative intent behind this amendment:

> If one fact is clear from the legislative history, it is that this language [of the Hickenlooper Amendment] was designed to be invoked by American firms in order to afford them "a day in court" — and presumably a monetary recovery — when some other entity attempted to market the American firms' expropriated property and some aspect of such an attempted transaction took place in this country.

The majority cites four cases presumably as support for the holding that the Hickenlooper Amendment is inapplicable because Hunt only acquired a contract right in the Concession Agreement. None of these cases, however, is directly on point, nor does any preclude a holding that a claim to property, granted by contract, is encompassed by the Hickenlooper Amendment. Of the four cases cited, only one actually involved a claim to tangible property that was expropriated and later brought into the United States.

Although the scope of the act of state doctrine must be determined under federal law, see *Sabbatino*, 376 U.S. at 427, the majority has relied on two state court cases. The New York State Court of Appeals decision, *French v. Banco Nacional de Cuba*, 23 N.Y.2d 46, 242 N.E.2d 704, 295 N.Y.S.2d 433 (1968), is distinguishable from the case at bar. Plaintiff in that case was holding certain "certificates of tax exemption" that the Cuban Government would no longer redeem. These certificates purported to allow the holder to convert pesos into United States dollars and to take those dollars out of Cuba without paying any exportation tax. The New York Court found that French's only loss was occasioned by a change in Cuban currency regulations

and did not therefore constitute a taking of property.[8] Furthermore, *French* involved no expropriated property, or proceeds thereof, brought into the United States. The plaintiff was seeking monetary recovery from an account maintained by Banco Nacional in New York City. The Hickenlooper Amendment was not intended to provide a remedy in this kind of situation. The Court did express, by obiter dicta, the opinion that the Hickenlooper Amendment would not apply to contract claims. The second state court case cited by the majority, *Present v. United States Life Ins. Co.*, 232 A.2d 863, aff'd, 241 A.2d 237 (N.J. 1968), did not involve a taking of property as contemplated by the Hickenlooper Amendment, nor did it involve a violation of international law.[9]

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[8] A legislator who reduces rates of interest or renders agreements invalid or incapable of being performed or prohibits exports, or renders performance more expensive by the imposition of taxes or tariffs does not take property. Nor does he take property if he depreciates currency or prohibits payment in foreign currency or abrogates gold clauses. Expectations relating to the continuing intrinsic value of all currency or contractual terms such as the gold clause are, like favorable business conditions and good will, "transient circumstances, subject to changes", and suffer from "congenital infirmity" that they may be changed by the competent legislator. They are not property, their change is not deprivation.

Mann, Money in Public International Law, 96 Recueil Des Cours [1959] 1, 90, *quoted in French v. Banco Nacional de Cuba*, 242 N.E.2d at 710.

[9] *Present* involved a claim to life insurance proceeds made on a New York insurance company based on a policy sold by that company's Cuban branch. That branch had been nationalized with all assets and liabilities assumed by the Cuban government. The plaintiffs were Cuban citizens at the time of the nationalization, emigrated to the United States, and brought the claim in the United States.

The court accurately pointed out that these persons had no claim to property that had been expropriated. In fact, when Cuba took over the insurance company, it expressly assumed the liabilities to the policy holders. The plaintiffs, however, had made no claim on the policy when they were still in Cuba. Furthermore, there

Menendez v. Saks and Co., 485 F.2d 1355 (2d Cir. 1973), cert. denied, 425 U.S. 991 (1976), followed the United States Supreme Court decision in *First National City Bank v. Banco Nacional de Cuba*, 406 U.S. 759 (1972), to avoid strict application of the act of state doctrine. The Court, in following that decision, concluded that "despite the act of state doctrine a counterclaim limited to the amount sought by the foreign sovereign was enforceable." *Menendez*, 485 F.2d at 1373. The Court concluded that the Hickenlooper Amendment did not govern the counterclaim against Banco Nacional and, in dicta, cited *French, supra.* The denial of certiorari by the United States Supreme Court in no way reflects approval of the dicta regarding the Hickenlooper Amendment.[10]

The only case cited that involved property allegedly expropriated and later brought into the United States was *Occidental of Umm Al Qaywayn, Inc. v. Cities Service Oil Co.*, 396 F.Supp. 461 (W.D. La. 1975), *dismissed in part, reversed in part*, 577 F.2d 1196 (1978). Occidental sued

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was no violation of international law because the plaintiffs, as citizens of Cuba at the time of the expropriation, were "subject to all laws enacted by Cuba — and all such laws were binding upon them and upon their property and property rights." *Id.* at 873. Although the court finds the Hickenlooper Amendment inapplicable here, it makes no comment concerning the general applicability of the amendment to contract claims.

[10] *Menendez* was a suit brought by Cuban interventors (those Cubans placed in control of expropriated cigar factories after expropriation by the government) for sums owed by United States importers. The importers sought an offset of moneys paid erroneously to the interventors for cigars received before the expropriation occurred. As indicated above, the court allowed such offset, refusing to apply the act of state doctrine to validate the interventors repudiation of moneys owed the importers.

Cities Service for the conversion of oil in three tankers, claiming that the oil had been produced from an area of the Persian Gulf in which Occidental held valid concession rights. Cities Service contended that it held the only valid concession rights to the area in dispute. Each company held a concession granted by one of the States bordering the Persian Gulf. The area covered by each concession was defined by the territorial waters of the State granting those rights. The boundary lines were in dispute between these governments, however, with each government claiming the area where this oil was produced. It was never clearly established that *Occidental* had valid concession rights in the area in dispute. The boundary dispute was the crucial factor that led the Fifth Circuit Court of Appeals to hold that the controversy between Occidental and Cities Service involved a political question and was therefore nonjusticiable. 577 F.2d 1196. In light of that holding on appeal, I consider the portion of the district court's opinion stating that the Hickenlooper Amendment does not apply to contract claims to be of no significant precedential value.

Occidental is further distinguishable from our case at bar because of the applicability of the second proviso of the Hickenlooper Amendment. That proviso precludes application of the amendment when the President "determines that application of the act of state doctrine is required in that particular case by the foreign policy interests of the United States and a suggesion to this effect is filed on his behalf in that case with the court." A letter from the State Department was included in the Government's amicus curiae brief in *Occidental* wherein the opinion was expressed that "it would be contrary to the foreign relations interests of the United States if our domestic courts were to adjudicate boundary controversies between third countries and in par-

ticular that controversy involved here." 577 F.2d at 1204, n. 13. Conversely, Hunt has produced expressions from the State Department supporting his pursuit of legal remedies in regard to the oil from the Sarir field, as will be discussed below.

I do not find any of the cases above to be controlling in light of the clear Congressional intent, as discussed previously, to include contractual rights to property within the exception provided by the Hickenlooper Amendment. Indeed, I have been cited to no case, and have discovered no case, holding squarely that a claim to property, granted by contract, is not encompassed by the Hickenlooper Amendment.

Finally, the amendment's application is not restricted to cases where the plaintiff has asserted a claim of title or other right to expropriated property. Rather, the amendment requires a determination on the merits "in a case in which a claim of title or other right to property is asserted *by any party . . . based upon (or traced through) a confiscation or other taking. . . .*" Therefore, by its language, the Hickenlooper Amendment applies if *either* the plaintiff, or the defendant, claims title or right to property based upon a taking by a foreign country. Clearly, Coastal States, the defendant here, is a party claiming the right to oil from the Sarir field based entirely upon Libya's taking of Hunt's concession rights. In this case, therefore, both the plaintiff, Hunt, and the defendant, Coastal States, are asserting claims of right to property that was expropriated by Libya.

B. Department of State's Support of Hunt.

The second proviso of the Hickenlooper Amendment exempts its application "in any case with respect to which the President determines that application of the act of state doctrine is required in that particular case by the foreign

policy interests of the United States and a suggestion to this effect is filed on his behalf in that case with the court." This provision avoids the situation that concerned the United States Supreme Court in *Sabbatino:* that judicial determinations of parties rights might interfere with, or embarrass, the Executive Branch of the government.[11] There has been no such request filed with any court in this case. In fact, the Department of State has indicated its belief that the Hickenlooper Amendment was passed precisely to permit American courts to entertain suits such as this, brought in pursuit of "hot" oil; that the nationalization of Hunt's interest in the Sarir field by Libya violated international law; and that wherever possible Hunt should be

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[11] The Department of State originally opposed the passage of the Hickenlooper Amendment. However, after the Hickenlooper Amendment was passed, the Department of State took the position that the amendment was valid and constitutional. *Banco Nacional de Cuba v. Farr,* 383 F.2d 166, 181, n. 16 (1967).

The State Department's acceptance of the Hickenlooper Amendment post-*Sabbatino* is further shown in a letter from its Legal Advisor to the Solicitor General, and appended to the majority opinion in *Alfred Dunhill of London, Inc. v. Cuba,* 425 U.S. 682, 706-11 (1976):

> In general this Department's experience provides little support for a presumption that adjudication of acts of foreign states in accordance with relevant principles of international law would embarrass the conduct of foreign policy. Thus, it is our view that if the Court should decide to overrule the holding in Sabbatino so that acts of state would thereafter be subject to adjudication in American courts under international law, we would not anticipate embarrassment to the conduct of the foreign policy of the United States.

Id. at 710-11.

The letter also refers to several recent decisions where courts of other nations have reviewed state acts under international law and noted that "As far as can be determined, this exercise of the judicial function in foreign jurisdictions has not caused serious foreign relations consequences for the countries concerned." *Id.* at 710.

supported in his pursuit of legal remedies.[12] It is apparent, therefore, that the Department of State has determined that adjudication of Hunt's claim by the judicial branch

[12] *Statement by the Department of State on policy on "hot" Libyan Oil*:

> Question has been raised in testimony before the Subcommittee on Multinational Corporations of the Senate Committee on Foreign Relations about the policy of the Department of State in respect of "hot" Libyan oil. The statement that follows describes that policy.
>
> . . .
>
> The *purpose of the Sabbatino Amendment*, which is the law today, *is precisely to permit American courts to entertain suits such as those that have been brought in pursuit of "hot"* oil. . . .
>
> . . .
>
> Following Bunker Hunt's nationalization, representatives of the Company requested the Department to support its litigation in respect of oil believed to originate in the expropriated concession. . . . It was the conclusion of the Department of State, in light of the illegal nature of the nationalization of Hunt and the implications which that action had for the interests of other U.S. nationals in Libya, and elsewhere, that the U.S. Government could and should take certain steps to support the Hunt Company's position. Hunt, and its concession partner, BP, should, it was thought, pursue their legal remedies wherever possible since a failure to do so would encourage the Libyan Government to continue its policy of expropriating foreign oil companies in violation of international law. Having determined that the nationalization on June 11 was invalid under international law, it was believed that it was important for the U.S. Government to assert that position on behalf of the Hunt Company, a U.S. national, in an attempt to make it as difficult as possible for the Libyan Government to profit by its unlawful acts. . . .
>
> . . .
>
> As noted, the State Department is of the view that the Libyan nationalization decrees . . . are violative of international law. The June decree was discriminatory, arbitrary and not for a public purpose; the September decree made an offer of inadequate compensation and also failed to respect the obligation to arbitrate disputes with concession holders. In these circumstances, and having regard to the foreign policies pursued by the Libyan Government and the state of relations between the Libyan and United States Governments, *it was and remains highly unlikely that the Executive Branch would*

of our government will cause no serious harm or embarrassment to the conduct of foreign policy by the Executive Branch of our government.

C. Violation of International Law

The amendment also requires that the taking by the foreign state be "in violation of the principles of international law, including the principles of compensation and the other

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> *find it appropriate to request courts in the United States to refrain from passing upon acts of the Libyan Government on grounds of "act of State."* (Emphasis added).

UNITED STATES OF AMERICA'S NOTE VERBALE NO. 59, Presented to Ministry of Foreign Affairs of the Libyan Arab Republic dated July 5, 1973:

> . . . It is clear from those pronouncements [the speech by Chairman Qadhafi, see p. 24 infra, and the official commentary accompanying the law expropriating Hunt's interest] that the reasons for the action of the Libyan Arab Republic Government against the rights and property of the Nelson Bunker Hunt Oil Company were political reprisal against the United States Government and coercion against the economic interests of certain other U.S. Nationals in Libya. Under established principles of international law, measures taken against the rights and property of foreign nationals which are arbitrary, discriminatory, or based on considerations of political reprisal and economic coercion are invalid and not entitled to recognition by other states.

LETTER, From William J. Casey, Under Secretary of State to G. Henry M. Schuler of Nelson Bunker Hunt, dated August 3, 1973:

> I am writing in response to your letter of August 2, 1973 regarding the nationalization on June 11, 1973 of Nelson Bunker Hunt's rights and property in Libya. In your letter, you requested me to approve the release of the text of a diplomatic note transmitted by the U.S. Government to the Government of the Libyan Arab Republic on July 8, 1973, which contained our position with respect to the June 11 nationalization. . . .
>
> . . . I am enclosing the text of the substance of the note and will provide you with certified copies . . . as soon as they are available. We have no objection to your using this note in connection with any pending or proposed litigation or in any other way appropriate to the assertion of your legal rights to the nationalized property. . . .

standards set out in this subsection." The majority does not reach this question since it found the Hickenlooper Amendment inapplicable to the instant case on other grounds.

Hunt contends that Libya's expropriation violated international law because it did not provide for prompt, adequate compensation and because it arbitrarily discriminated against him for a political purpose unrelated to any legitimate public interest. In my view, the Hickenlooper Amendment itself requires speedy compensation, equivalent to the full value of the expropriated property.

The amendment refers to the "principles of compensation and the other standards set out in this subsection" as guidelines for the determination of the adequacy of compensation. That subsection, 22 U.S.C. 2370(e)(1), requires the President to suspend assistance to any country expropriating property owned more than 50% by the United States' citizens if that government does not, within a reasonable time after the expropriation, take steps to discharge its obligations toward those citizens, "including speedy compensation for such property in convertible foreign exchange, equivalent to the full value thereof, as required by international law. . . ." The statute, therefore, anticipates that United States' citizens will receive the full value of their expropriated property and that such compensation will be forthcoming shortly after the expropriation takes place. Other authority indicates further that the United States expects compensation to its citizens for expropriated property to be reasonably prompt and to be for the full market value.[18]

[18] § 188. Adequacy of Compensation

(1) Compensation, to be adequate in amount within the meaning of § 187, must be in an amount that is reasonable under

It is uncontested that Hunt received no compensation from Libya until approximately two years after the expropriation and that the compensation received at that time was limited to the net book value of the physical assets on the concession at the time of the nationalization. The nationalization decree purported to provide some measure of compensation to Hunt. However, the amount of compensation was to be determined by a committee appointed by Libya's oil minister, with no provision for Hunt to produce evidence as to the value of his interest in the Sarir field. Further, the decree explicitly precluded any appeal from the committee's decision. The *Restatement of the Law (Second), Foreign Relations Law of the United States*, § 185

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the circumstances . . . Under ordinary conditions, . . . *the amount must be equivalent to the full value of the property taken*, together with interest to the date of payment. (Emphasis added).

Restatement of the Law (Second), Foreign Relations Law of the United States, § 188 (1965).

The President of the United States, in January 1972, drew attention to the importance which the United States attaches to respect for the property rights of its nationals. He stated that the policy of the United States concerning expropriatory acts includes the position that: "Under international law, the United States has a right to expect:

— That any taking of American private property will be nondiscriminatory;

— That it will be for a public purpose; and

— That its citizens will receive prompt, adequate, and effective compensation from the expropriating country."

With regard to current or future expropriations of property or contractual interests of U.S. nationals, or arrangements for "participation" in those interests by foreign governments, the Department of State wishes to place on record its view that foreign investors are entitled to the fair market value of their interests.

DEPARTMENT OF STATE PRESS RELEASE NO. 630, December 30, 1975.

(1965) states that the taking of property by a state is wrongful under international law if, among other things, "there is not reasonable provision for the determination and payment of just compensation." Comment (e) elaborates on this requirement and explicitly refers to two elements of fairness which were denied Hunt: that an impartial tribunal or administrative authority determine his rights, and that he have a reasonable opportunity to obtain and present witnesses and evidence in his own behalf. I conclude that the compensation provisions of the nationalization decree were illusory and did not meet the requirements for adequate compensation.

Coastal States points out that several countries notably Latin American and Communist countries, do not acknowledge any duty to provide compensation to aliens for expropriated property. There is also disagreement among international law experts as to whether something less than full market value may constitute adequate compensation. However, in the case at bar, we have the additional consideration that the property was seized as a means of political and economic retaliation against the United States.

The retaliatory nature of Libya's expropriation of Hunt's interest in the Sarir field is clearly shown in the text of a speech given by Libyan Chairman Mu'ammar al-Qadhafi at a celebration marking the third anniversary of the closing of the United States Air Force Base at Wheelus:

> The United States, which has suffered defeats everywhere, has not yet been taught the final lesson, especially when we see it being quarrelsome in the Arab world and completely siding with Israel . . . we say with a loud voice that this United States needs to be given a big hard blow on its cold insolent face in the Arab area.

> U.S. policy, brothers, is going to lead to a catastrophe for U.S. interests in the Arab area in particular.
>
> The time has come for the Arab peoples to confront the United States. The time has come for the U.S. interests to be threatened earnestly and seriously in the Arab area, regardless the cost . . . The United States is still scorning the Arab nation and its rights. It is continuously giving Israel the most modern arms to enable it to humiliate the Arab nation or to conquer at its will or to remain unjustly in the occupied territory. Also, U.S. (arrogance) is now manifested in the attitude of the oil companies . . . However, the time may come, if it has not already come, for the serious and dangerous confrontation to take place — a confrontation the cost of which we must bear — with the oil companies and with the entire U.S. imperialism.
>
> On this occasion, the RCC of the Libyan Arab Republic has decided to nationalize the American oil company Bunker Hunt. (Emphasis added).

There is generally a consensus among authorities that an uncompensated expropriation, when done as an act of retaliation, is contrary to international law. The Second Circuit Court of Appeals reviewed such authorities and concluded:

> Unlike the situation presented by a failure to pay adequate compensation for expropriated property when the expropriation is part of a scheme of general social improvement, confiscation without compensation when the expropriation is an act of reprisal does not have significant support among disinterested international commentators from any country. And despite our best efforts to deal fairly with political and social doctrines vastly different from our own, we also cannot find any reasonable justification for such procedure. Peacetime seizure of the property of nationals of a particular country, as an act of reprisal against that country, appears to this court to be contrary to generally accepted principles of morality throughout the world.

Banco Nacional de Cuba v. Sabbatino, 307 F.2d 845, 866 (1962), reaffirmed in *Banco Nacional de Cuba v. Farr*, 383 F.2d 166, 183, cert. denied, 390 U.S. 956 (1968). I agree with the reasoning of the Second Circuit Court of Appeals and would hold that the expropriation of Hunt's interest in the Sarir field by Libya was without prompt, adequate compensation; that the expropriation was in retaliation against the United States; and that for these reasons the expropriation violated international law.

I would reverse the summary judgment against Hunt and remand his suit against Coastal States for a determination on the merits.

Zollie Steakley
Justice

Chief Justice Greenhill and Justice Franklin Spears join.

OPINION DELIVERED: June 13, 1979

APPENDIX C

Affirmed, and Opinion filed August 23, 1978.

No. 1809

NELSON BUNKER HUNT, ET AL,
Appellants-Appellees

vs.

COASTAL STATES GAS PRODUCING COMPANY,
ET AL, Appellees-Appellants

Appeal from 133rd District Court
of Harris County

Nelson Bunker Hunt, Herbert Hunt and Lamar Hunt (collectively referred to as "Hunt") originally instituted a suit for conversion against Coastal States Gas Producing Company and Coastal States Marketing, Inc. (collectively referred to as "Coastal States") claiming that Coastal States had converted oil to which Hunt was entitled by virtue of a concession agreement with Libya. Coastal States answered and filed a counterclaim for tortious interference with its contract and business opportunities. Coastal States moved for summary judgment on Hunt's claim. Hunt moved for summary judgment only on the issue of liability in the original suit and for a general summary judgment against Coastal States on Coastal States' counterclaim. The trial court granted Coastal States' motion for summary judgment in

the original suit and Hunt's motion for summary judgment on the counterclaim. Both sides appeal.

In 1957 Libya granted a concession (Concession Number 65) to Nelson Bunker Hunt. The concession gave Hunt the right, for fifty years, to explore, drill and extract oil. Subsequently, Herbert Hunt and Lamar Hunt acquired an interest in the concession pursuant to an agreement with Nelson Bunker Hunt. In 1960, with the approval of the Libyan government, the Hunts assigned a one-half undivided interest in the concession to British Petroleum Exploration Company, Limited.

In 1961 oil was discovered in the concession (hereinafter called the Sarir field). Oil was produced in marketable quantities by 1967. In 1971, the Libyan government nationalized the operations and interest of British Petroleum in the Sarir field and transferred its rights to the Arabian Gulf Exploration Company (AGECO).

In 1973, the Libyan government, by the enactment of Libyan Law Number 42, nationalized Hunt's interest in the Sarir field. Article 1 of Libyan Law Number 42 provides:

> The rights of Nelson Bunker Hunt in Oil Concession Agreement No. 65 shall be nationalized, and ownership of all the funds, rights, assets and shares of Nelson Bunker Hunt in the said concession shall revert to the State, including specifically all the rights relating to the installations and facilities for prospecting, exploration and drilling for, and production of, crude oil and natural gas, as well as for transportation, processing, storage and export, and other assets and rights relating to the said concession.

Hunt's rights and assets were then transferred and assigned to AGECO. Hunt subsequently published notices in newspapers throughout the world claiming that the Libyan nationalization of the Sarir field violated international law and was of no effect, and additionally threatened suit against anyone who came into possession of Sarir oil. In May 1973, approximately the time the nationalization decree was issued, Coastal States entered into a contract with AGECO to purchase oil from the Sarir field. The oil was then transported to a refinery in Italy. This contract was consummated and performed despite Hunt's claims against Libya. Hunt ultimately settled his claims against Libya in May 1975. In that agreement, Hunt released any and all claims against the Libyan government which arose out of the nationalization of the Sarir field. Hunt was paid approximately $19,000,000.00 as consideration.

In August, 1973 Hunt instituted this suit against Coastal States for conversion of the Sarir field oil. Hunt claimed that the Libyan government confiscated his property in violation of: (1) the concession agreement between the parties; (2) international law; and (3) the public policy of the United States and that such an illegal confiscation could not and did not affect Hunt's rights to recover against subsequent converters of oil from the Sarir field. Hunt claimed that Coastal States acquired the petroleum from the Sarir field and exercised dominion and control over such oil with full knowledge of and inconsistent with Hunt's possessory rights, title and interest. Coastal States counterclaimed against Hunt for tortious interference with Coastal States' contractual relations and business opportunities.

At a pre-trial hearing both Hunt and Coastal States called experts in international and foreign law who expressed their opinions regarding the application of Libyan and international law to the facts presented in this case. Following the hearing, the parties submitted motions for summary judgment.

In October 1977 the trial court entered its final judgment, granting Coastal States' motion for summary judgment on Hunt's conversion claim, denying Hunt's motion for summary judgment on the issue of liability and granting Hunt's motion for summary judgment on Coastal States' claim for tortious interference with Coastal States' contracts and business opportunities. The trial court additionally filed conclusions of law stating that Libyan law determined the interest acquired by Hunt in the Sarir field, and, under Libyan law, Hunt did not acquire title to the oil, but merely a contract right to extract the oil. The trial court also found that the Act of State Doctrine applied to this case and foreclosed the trial court from inquiring into the validity of the Libyan nationalization of Hunt's interest in the Sarir field, and, no exception to this doctrine was applicable. Regarding Coastal States counterclaim for tortious interference, the court held that, as a matter of law, Hunt's actions in giving notice of his claim to oil from the Sarir field did not violate either state or federal law, and his actions in giving such notice were neither malicious or capricious.

Both parties appeal from the judgment rendered by the trial court.

APPEAL BY HUNT

Hunt asserts seven points of error attacking the trial court's findings as to the applicability of the Act of State Doctrine, the applicability of Libyan law rather than international law, and its findings that Hunt had only a contractual right to extract the oil.

Since Coastal States' possession of the oil is clearly rightful, and does not constitute a conversion, if its transferor's title was good, the critical issue in the resolution of Hunt's whole suit is whether Libya's expropriation was valid. This,

in turn, presents the question of whether a Texas court may inquire into the acts done by a foreign sovereign. Such inquiry is generally barred by the Act of State Doctrine. In his first two points Hunt asserts four reasons why the Act of State Doctrine, which bars inquiry into the validity of the actions of an expropriating nation, should not apply to the Libyan nationalization in this case: (1) the State Department has expressed its views that the Libyan nationalization was violative of international law and it would be unlikely that the executive branch would request American courts to refrain from considering the validity of the acts of Libya on the grounds of the Act of State Doctrine (the *Bernstein* exception); (2) Libya, by nationalizing the oil field and marketing the petroleum in international commerce did not act officially as a sovereign (the commercial act exception); (3) the Hickenlooper amendment, designed to undercut the Act of State Doctrine is applicable; and (4) Libya and Hunt, parties to the concession agreement, included an "applicable law" clause in the concession agreement which is unambiguous and these terms should be given effect regardless of the Act of State Doctrine.

For reasons discussed herein, we affirm the summary judgment against Hunt.

THE ACT OF STATE DOCTRINE

The Act of State Doctrine is a judicially created doctrine of restraint. The classic formulation of that doctrine was restated in *Banco Nacional de Cuba v. Sabbatino:*

> Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory. Redress of grievances by reason of such acts must be

> obtained through the means open to be availed of by sovereign powers as between themselves.

376 U.S. 398, 416; 84 S. Ct. 923, 934 (1964) *quoting Underhill v. Hernandez*, 168 U.S. 250, 252, 18 S. Ct. 83, 84 (1897).

Hunt claims under his second point that the *Bernstein* exception to this doctrine applies and permits judicial inquiry into the validity of the Libyan nationalization. *See Bernstein v. N. V. Nederlandsche-Amerikaansche Etc.*, 210 F.2d 375 (2d Cir. 1954). We disagree.

It is highly questionable whether there is such an exception. In *First National City Bank v. Banco Nacional de Cuba*, Justice Rehnquist defined and analyzed the *Bernstein* exception and concluded:

> [T]hat where the Executive Branch, charged as it is with primary responsibility for the conduct of foreign affairs, expressly represents to the Court that application of the act of state doctrine would not advance the interests of American foreign policy, that doctrine should not be applied by the courts. In so doing, we of course adopt and approve the so-called *Bernstein* exception to the act of state doctrine.

406 U.S. 759, 768, 92 S. Ct. 1808, 1813 (1972). However, the dissent, comprised of four justices, pointed out that only Chief Justice Berger and Justice White concurred with Justice Rehnquist. Two additional justices concurred with Justice Rehnquist only in result. The dissent explicitly rejected the *Bernstein* exception and reasoned that the validity of a foreign act of state is a "political question not cognizable in our courts." 406 U.S. at 787-88, 92 S. Ct. at 1823. Additionally, Justice Powell, in his concurring opinion disapproved of the *Bernstein* exception.

> I would be uncomfortable with a doctrine which would require the judiciary to receive the Executive's permission before invoking its jurisdiction. Such a notion, in the name of the doctrine of separation of powers, seems to me to conflict with that very doctrine.

406 U.S. at 773, 92 S. Ct. at 1816. Therefore, we conclude that the *Bernstein* exception is no longer viable, and we do not consider whether the expressions of the State Department regarding the Libyan nationalization were sufficient expressions to the court. *See Alfred Dunhill of London v. Republic of Cuba*, 425 U.S. 682, 725, 96 S. Ct. 1854, 1875-76 (1976) (dissenting opinion); *Menendez v. Saks and Company*, 485 F.2d 1355, 1373 (2d Cir. 1973) *rev'd on other grounds sub nom., Alfred Dunhill of London v. Republic of Cuba*, 425 U.S. 682, 96 S. Ct. 1854 (1976). *See also Hunt v. Mobil Oil Corp.* 550 F.2d 68, 77-79 (2d Cir. 1977). Furthermore, we decline to give credence to the exception due to the separation of powers rationale enunciated in Justice Harlan's opinion in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 84 S. Ct. 923 (1964) and in Justice Powell's concurring opinion in *First National City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 773-76, 92 S. Ct. 1808, 1816-17 (1972).

Hunt's second contention in his first point of error is that when a foreign government engages in a "commercial" activity, such as Libya's conduct with regard to the Sarir field, the Act of State Doctrine does not apply and a court can inquire into the validity of the nationalization decree. In Hunt's brief, he directs this court to consider language from *Alfred Dunhill of London v. Republic of Cuba:*

> [W]e are nevertheless persuaded by the arguments of petitioner and by those of the United States that the concept of an act of state should not be extended to include the repudiation of a purely commercial obligation owed by a foreign sovereign or by one of its commercial instrumentalities. Our cases have not yet gone so far, and we decline to expand their reach. . . .

425 U.S. 682, 695, 96 S. Ct. 1854, 1861 (1976). The aforementioned language is authorized by Mr. Justice White. However, upon examination of *Dunhill*, we conclude that this language is not the language of a majority of the Supreme Court and the validity or existence of this exception is likewise doubtful. But, in any event, when a foreign state has exercised a sovereign power, as Libya did here, it is a governmental, and not a commercial, act. *Alfred Dunhill of London v. Republic of Cuba*, 425 U.S. 682, 720, 96 S. Ct. 1854, 1873 (1976) (dissenting opinion). *See Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 84 S. Ct. 923 (1964); *Hunt v. Mobil Oil Corp.*, 550 F.2d 68 (2d Cir. 1977).

In Hunt's second point, he claims that the trial court committed error when it refused to apply the Hickenlooper amendment to obviate and avoid the Act of State Doctrine. The Hickenlooper amendment (sometimes referred to as the *Sabbatino* amendment) was enacted by Congress in reaction to the *Sabbatino* holding. The pertinent portions state that:

> [N]o court in the United States shall decline on the ground of the federal Act of State Doctrine to make a determination on the merits giving effect to the principles of international law in a case in which a claim of title or other right to property is asserted by any party including a foreign state . . . based upon (or) traced through) a confiscation or other taking . . . by an act of that state in violation of the principles of international law.

22 U.S.C. § 2370(e)(2). We recognize at the outset that this exception is extremely narrow. *Occidental of Umm Al Qay, Inc. v. Cities Serv. Oil Co.*, 396 F. Supp. 461, 471 (W.D. La. 1975); *Occidental Petroleum Corp. v. Buttes Gas & Oil Co.*, 331 F. Supp. 92, 112 (C.D. Cal. 1971), *aff'd*, 461 F.2d 1261 (9th Cir. 1972), *cert. denied*, 409 U.S. 950, 93 S. Ct. 272;

United Mexican States v. Ashley, 556 S.W.2d 784, 786 (Tex. Sup. 1977).

Three elements must exist in order to avoid the Act of State Doctrine under the Hickenlooper amendment. First, expropriated property must come within the territorial jurisdiction of the United States. Second, the act of the expropriating nation must be in violation of international law. Third, the asserted claim must be a claim of title or other right to property.

Without considering the merits of the first two requirements we conclude that the Hickenlooper amendment is inapplicable to this case because Hunt acquired only a contract right in the concession agreement. *See Occidental of Umm Al Qay., Inc. v. Cities Serv. Oil Co.*, 396 F.Supp. 461, 472 (W.D. La. 1975); *French v. Banco Nacional de Cuba*, 295 N.Y.S.2d 433, 448 (N.Y. Ct. App. 1968).

There was some disagreement among the testifying experts as to whether, in construing the contract, international law or Libyan law applied. But international law does not govern the nature of the rights conferred by the contract. Under well established Texas conflict of laws rules, Libya substantive law governs the interpretation and construction of the concession agreement. This is true whether the oil is characterized as personalty or realty since Libya is both the place of the contract's execution and performance and the location of its subject matter. *Cantu v. Bennett*, 39 Tex. 304 (1873); *see Austin Building Co. v. National Union Fire Ins. Co.*, 432 S.W.2d 697 (Tex.Sup. 1968) (personalty); *Colden v. Alexander*, 171 S.W.2d 328 (Tex.Sup. 1943) (realty). Although expert witnesses called by the parties also differed on the meaning and effect of the applicable law, the law is explicitly stated and clear. Libyan Petroleum Law Number 25 of 1955 provides:

> (1) All persons in Libya in its natural state in strata is the property of the Libyan State.
>
> (2) No person shall explore or prospect for, mine or produce petroleum in any part of Libya, unless authorized by a permit or concession issued under this law.

The original agreement executed in 1957 provided, in clause 1, that:

> . . . the Commission hereby grants to the Company, subject to the conditions hereof and the provisions of the Law, the exclusive right for a period of . . . fifty . . . years to carry out geological investigations, including aerial surveys, and to search for by any other means, bore for, and extract petroleum within and over the area outlined in red on the map annexed hereto of approximately . . . 32944 ..... square kilometres situated in the ..... 3 ..... Zone bounded and defined. . . .
>
> The Company shall also have the right to take away such petroleum whether by pipeline or otherwise from the concession area and to use, process, store, export and dispose of the same.

Clause 29 of that agreement, titled "Interpretation," states that the "Law" means the Petroleum Law of 1955.

Further, the amended agreement voluntarily entered into by Hunt and Libya in January 1966, approximately five years before Libya's gradual nationalization of the Sarir field, and after oil had been discovered, again specifically refers to and is governed by Petroleum Law Number 25 of 1955. Clause 16 of that agreement states:

> (1) The Government of Libya will take all the steps necessary to ensure that the Company enjoys all the rights conferred by the Concession. The contractual rights expressly created by this concession shall not be altered except by mutual consent of the parties.

> (2) This Concession shall throughout the period of its validity be construed in accordance with the Petroleum Law and the Regulations in force on the date of the execution of the agreement of amendment by which this paragraph 2 was incorporated into this concession agreement. Any amendment to or repeal of such Regulations shall not affect the contractual rights of the Company without its consent.

This language is significant in that it not only refers to Hunt's rights as "contractual" but also recognizes Libya's ownership of the oil. As this court has recently had occasion to point out, phrases in important, multimillion dollar contracts are not inserted loosely, and it is presumed that the parties to such an agreement were aware of the significance and effect of each word agreed upon. *See City of Houston v. R. F. Ball Construction Company, Inc.*, Docket No. 1750 (Tex.Civ.App. — Houston [14th Dist.] July 12, 1978).

Hunt argues that it is clause 28(7) of the concession agreement, not clause 29 or clause 16, that governs the rights of the parties, and, under that clause international law applies. Clause 28(7) reads:

> This Concession shall be governed by and interpreted in accordance with the principles of law of Libya common to the principles of International Law and in the absence of such common principles, then by and in accordance with the general principles of law, including such of those principles as may have been applied by international tribunals.

This clause, however, deals solely with arbitration. It speaks not to the nature of the rights granted and acquired under the concession agreement, but merely to the enforcement of those rights following a breach of the agreement; it deals with remedies, not substantative rights. In this

regard we agree with the analysis offered by K. Lipstein in 29 Transactions of the Grotius Society, *Conflict of Laws Before International Tribunals (II)*, 55-56 (1943):

> First, the tribunal must decide whether a private party interest exists in the light of domestic law and in whom such interest is vested.
>
> * * *
>
> Secondly; once the preliminary investigation has established the existence of a private law right, the tribunal must determine whether the violation of the right acquired under municipal law constitutes an illegal act under international law.

Libyan Law Number 42 did expropriate the physical assets of Hunt but Libya never relinquished its ownership of the oil, and consequently cannot have expropriated it from Hunt. While Libya's actions presumably constituted a breach of the concession agreement with Hunt, they do not amount to a confiscation of the oil since Hunt never acquired a valid claim of title or other right in the unsevered oil but only a right to the oil which Hunt extracted. Therefore, the Hickenlooper amendment does not apply and the Act of State Doctrine precludes judicial inquiry into Libya's actions. *See Occidental of Umm Al Qay., v. Cities Serv. Oil Co.*, 396 F. Supp. 461, 472 (W.D. La. 1975); *French v. Banco Nacional de Cuba*, 295 N.Y.S.2d 433, 448-49 (N.Y. Ct. App. 1968).

The fourth exception which Hunt asserts in an attempt to avoid the application of the Act of State Doctrine is that it simply does not apply when the private enterprise and expropriating country have jointly executed an unambiguous agreement which enunciates controlling legal principles. Hunt points to the "applicable law" clause (clause 28(7)) in the 1957 concession agreement, and then directs this

court to language *in Banco Nacional de Cuba v. Sabbatino*, in which Hunt claims that the Act of State Doctrine does not apply:

> [T]he Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign sovereign government, extant and recognized by this country at the time of suit, in the absence of a treaty or other unambiguous agreement regarding controlling legal principles, even if the complaint alleges that the taking violates customary international law.

376 U.S. 398, 428, 84 S. Ct. 923, 940 (1964). We have examined subsequent cases which cite the aforementioned language and conclude it is unclear what type of "unambiguous agreement" the opinion refers to. However, we conclude that this language is inapplicable to this case since, as we have held, Libya did not expropriate property (the oil) from Hunt.

We have examined all of Hunt's points of error and, having concluded that the Act of State Doctrine bars judicial inquiry into the validity of Libya's actions, the trial court's grant of summary judgment against Hunt on his claim for conversion is hereby affirmed.

APPEAL BY COASTAL STATES

Coastal States, in its nine points of error, claims that the trial court erred when it granted Hunt's motion for summary judgment on Coastal State's claims of tortious interference with its contract and business opportunities. We have considered these points and they are hereby overruled.

An essential element to the claims for tortious interference with contractual relations and business relations is that the

defendant's acts must have no legal justification. We have examined the record and conclude that as a matter of law Hunt's actions were legally justified and there is no genuine issue of fact on this essential element. *See Gibbs v. General Motors Corporation*, 450 S.W.2d 827 (Tex.Sup. 1970).

The trial court concluded that Hunt had a contractual interest in the Sarir field at the time of nationalization. This interest was repudiated by Libya and the record clearly shows that Hunt instituted litigation against various corporations in the international community due to their dealings in Sarir oil and additionally apprised corporations of his intent to file suit if indeed they dealt with such oil. However, these actions were legally justified due to the repudiation of the concession agreement. *See Terry v. Zachry*, 272 S.W.2d 157 (Tex.Civ.App. — San Antonio 1954, writ ref'd n.r.e.). *See also St. Joseph Pro Bldg. Corp. v. American Nat. Ins. Co.*, 511 S.W.2d 578 (Tex.Civ.App. — Houston [14th Dist.] 1974, writ ref'd. n.r.e.).

The court properly granted Hunt's motion for summary judgment on Coastal States' claims of tortious interference with business contracts and business relations; there is no genuine issue of fact regarding the essential element of no legal justification.

The trial court's judgment is affirmed.

/s/ GEORGE E. CIRE

Associate Justice

Judgment rendered, and Opinion filed August 23, 1978.

JUDGMENT

NELSON BUNKER HUNT, ET AL

vs. No. 1809

COASTAL STATES GAS PRODUCING COMPANY, ET AL

"This cause, being an appeal from the judgment rendered and entered by the court below on October 24, 1977, came on to be heard on the transcript of the record, and the same being inspected, because it is the opinion of this Court that there is no error in the judgment, it is therefore considered, adjudged and ordered that the judgment of the court below be affirmed in all things. It is further ordered that the appellants, Nelson Bunker Hunt, Herbert Hunt and Lamar Hunt, and their surety, Lawyers Surety Corporation, pay all costs incurred by them by reason of this appeal. It is further ordered that appellants, Coastal States Gas Producing Company and Coastal States Marketing, Inc., and their surety, Highlands Insurance Company, pay all costs incurred by them by reason of this appeal. It is further ordered that this decision be certified below for observance."

APPENDIX D

IN THE DISTRICT COURT OF
HARRIS COUNTY, TEXAS
133RD JUDICIAL DISTRICT

No. 952,564

NELSON BUNKER HUNT, HERBERT HUNT
AND LAMAR HUNT

VS.

COASTAL STATES GAS PRODUCING
COMPANY, et al

FINAL JUDGMENT

CAME ON the above entitled and numbered cause wherein Nelson Bunker Hunt, Herbert Hunt and Lamar Hunt (hereinafter collectively called "Hunt") are plaintiffs and counter-defendants and Coastal States Gas Producing Company and Coastal States Marketing, Inc. (hereinafter collectively called "Coastal States"), are defendants and counter-claimants, for hearing on the motions of both plaintiffs and defendants for summary judgment, and came all parties by and through their counsel of record and announced to the Court that each waived any and all time requirements regarding the filing and service of motions for summary judgment and that they were ready to proceed with hearing on such motions. The Court, having considered the motion, the summary judgment record, the arguments, briefs and

evidentiary presentations of law by the parties, and being fully advised in the premises does make and enter the following conclusions of law:

1.

Libyan law determines the interest acquired by Hunt in Concession No. 65.

2.

Under Libyan law, Hunt did not acquire title to petroleum in strata underlying the area of Concession No. 65 by said Concession Agreement, but only a contractual right to extract such petroleum.

3.

The Libyan Nationalization Decree (Law No. 42 of 1973) did not take from Hunt any interest in or title to crude oil that Coastal States purchased from Libya pursuant to the contract ("AGECO") dated May 2, 1973 and the contract between Ashland Oil Company of California and AGECO dated April 11, 1973.

4.

Nothing taken from Hunt by the said Nationalization Decree was purchased by Coastal States from Libya pursuant to said contracts.

5.

The Act of State Doctrine applies to foreclose the Court from inquiring into the validity of said Libyan Nationalization Decree.

6.

No exception to the Act of State Doctrine applies in this case.

7.

Plaintiffs are not entitled to recover against Coastal States.

8.

Hunt's actions in giving notice of his claim to oil produced from Concession No. 65 (the Sarir Field) following the Libyan confiscation, by newspaper and otherwise, *was not in violation of* the law and public policy of the State of Texas and of the United States of America.

9.

Hunt's actions in giving such notice were not malicious or capricious.

It is noted by the Court that there is a suit between the parties pending in the United States District Court for the Southern District of Texas, Houston Division under Cause No. 74-H-1422. It has been represented to the Court that such action is based upon the United States Antitrust Laws, and in making and entering the above and foregoing conclusions of law, this Court has not considered and does not purport to pass upon the legality of any action of the parties, or any of them under or in light of the United States Antitrust Laws. Accordingly, it is

ORDERED, ADJUDGED AND DECREED that the motion for summary judgment of Hunt that Coastal States take nothing against Hunt by reason of Coastal States' counterclaim is granted, and judgment is hereby rendered that Coastal States take nothing of and against Hunt by reason of its counterclaim. It is further

ORDERED, ADJUDGED AND DECREED that Coastal States' motion for summary judgment that Hunt take nothing

against Coastal States by reason of Hunt's action is granted, and judgment is hereby rendered that Hunt take nothing of and against Coastal States. It is further

ORDERED, ADJUDGED AND DECREED that Hunts' motion for summary judgment that it be granted judgment against Coastal States for its damages or in the alternative partial summary judgment establishing the liability of Coastal States to Hunt be and hereby is denied.

DONE and ENTERED this 24th day of October, 1977.

/s/ PAUL PRESSLER

APPROVED AS TO FORM ONLY:

SHANK, IRWIN, CONANT, WILLIAMSON & GREVELLE

BY A. B. CONANT, JR.
A. B. Conant, Jr.

FULBRIGHT & JAWORSKI

BY DAN MATTHEWS
Dan Matthews

APPENDIX E

IN THE DISTRICT COURT OF
HARRIS COUNTY, TEXAS
133RD JUDICIAL DISTRICT

NELSON BUNKER HUNT, et al

vs.

COASTAL STATES GAS
PRODUCING COMPANY

ORDER

On November 15, 1976, the above styled and numbered cause was called for trial and each of the parties hereto having announced ready, such cause was and has been convened.

It appearing, however, that certain additional hearings, determinations, and discovery should be completed prior to jury selection herein and in the interest of the orderly administration of this case, the Court, with the concurrence of counsel for all parties, does hereby make the following order:

I. SETTING OF PRELIMINARY HEARING

1. The Court hereby sets for hearing beginning December 6, 1976 and continuing from day to day thereafter until completed, without the intervention of a jury, the determination of all questions of international, foreign or domestic law presented by this litigation.

2. At such hearing, each of the parties shall be entitled to tender for examination, cross-examination, and examination by the Court, such experts on questions of international or foreign law as they may desire and may submit to the Court such written briefs or memoranda of law as they may believe to be helpful to the Court in determination of the questions therein presented.

3. At such hearing, expert witnesses shall be presented, first, by Hunt, et al., and second by Coastal States Gas Producing Company, with each party thereafter to present such rebuttal testimony as they desire in the same order.

II. LEGAL ISSUES TO BE DETERMINED

The following are the legal issues to be determined at the hearing set in Section I, above, as delineated by each party hereto, together with such subsidiary issues as may seem reasonable or proper to the determination of such issues:

(1) The issues as tendered by Hunt are:

(a) Whether under pertinent choice-of-law and other rules of Texas and the United States international law governs the construction and application of Concession 65 and the rights of Hunt and the Government of Libya thereunder.

(b) Whether international law is a part of the law of the United States and of the State of Texas.

(c) What the sources are to which courts in the United States must refer to determine the principles of international law to be applied by them.

(d) Whether international law determines the validity or legality of the Libyan expropriation of the interest of Hunt in Concession 65.

(e) Whether, under international law or U.S. Federal law, the expropriation of the interest of Hunt in Concession 65 was an arbitrary and wrongful breach of contract which did not affect the property rights previously granted by it to Hunt.

(f) Whether, under international law, the expropriation of Hunt's interest in Concession 65 was wrongful if it was done to effect a political reprisal rather than to effect a legitimate public purpose related to the internal needs of Libya.

(g) Whether, under international law, the expropriation of Hunt's interest in Concession 65 was an act of political reprisal.

(h) Whether, under international law, the Libyan expropriation of Hunt's interest in Concession 65 was wrongful if it was discriminatory rather than general in application.

(i) Whether, under international law, the expropriation of Hunt's interest in Concession 65 was discriminatory.

(j) Whether, under international law, the expropriation of Hunt's interest in Concession 65 was illegal if it failed to provide for prompt, adequate and effective compensation.

(k) Whether, under international law, the expropriation of Hunt's interest in Concession 65 did fail to provide for prompt, adequate and effective compensation.

(l) Whether, under established U. S. public policy, when a foreign petroleum concession is expropriated in violation of international law as applied by the United States, the United States favors and supports actions taken by the victim to protect its rights by notifying prospective purchasers of its claim to continued ownership of petroleum taken from the expropriated concession and to initiate legal action in the United States against a purchaser of the petroleum or its products to recover the goods or their proceeds?

(m) Whether the courts of the State of Texas follow the public policy of the United States in matters pertaining to foreign expropriations.

(n) Whether under international law, if the expropriation were invalid for any of the foregoing reasons, Hunt's rights to the property in question, i.e., Sarir oil, its products and proceeds, are superior to the rights, if any, acquired by Coastal as a result of its purchases of oil from the Government company of the Libyan Arab Republic following such expropriation.

(o) Whether, under international law, an appropriate remedy for the protection of Hunt's rights under Concession 65 was a Texas action for conversion.

(p) Whether the Act of State Doctrine applies to a government taking in contravention of a concession agreement and, more particularly, the taking of Hunt's rights under Concession 65.

(q) Whether, if the Act of State Doctrine would otherwise apply, the Hickenlooper Amendment nevertheless requires the Court to pass upon the validity of the expropriation of Hunt's interest in Concession 65.

(r) Whether, under international law, the payment made pursuant to the Agreement of May 19, 1975 constituted prompt, adequate, and effective compensation for oil theretofore wrongfully taken and sold by the Libyan Government to Coastal.

(s) Whether, under applicable law, Coastal was released by Hunt by such Agreement.

(2) The issues as tendered by Coastal are:

(a) Whether Libyan law determines what rights were acquired under the Concession Agreement.

(b) Whether, under Libyan law, Hunt (and his assignee BP) never obtained title or property right in and to the Sarir crude extracted by Arabian Gulf Exploration Company.

(c) Whether, if Hunt never acquired title or property right to the Sarir crude extracted by Arabian Gulf Exploration Company, rules of international law relating to the conditions under which title or property rights may be taken from aliens are irrelevant.

(d) Whether, under the applicable law, Hunt relinquished any rights he may have had against Libya and Coastal States by his Settlement Agreement with the Government of Libya.

(e) Whether the acts of the Libyan Government of December 7, 1971, and June 11, 1973 were acts taken by the Government within its own territory and the Act of State Doctrine precludes this Court from examining the validity and effectiveness of such acts.

(f) Whether, if the title of Coastal States and Marketing is not based upon or traced through a confiscation or other taking of crude oil, the Hickenlooper Amendment does not apply to allow this Court to examine the validity and effectiveness of the measures taken by the Libyan Government within its own territory even if those measures would be in conflict with the principles of international law.

III. STIPULATIONS OF DOCUMENTARY EVIDENCE

The parties have stipulated as to the relevance, admissibility, and authenticity of the following documents, for the purposes of the hearing referred to in Section I, above:

(a) Concession No. 65, dated December 18, 1957;

(b) Assignment by Hunt to BP dated November 10, 1960;

(c) Hunt's Agreement for Amendment of Petroleum Concession No. 2 plus one-half interest in Concession No. 65 dated January 20, 1966;

(d) BP's Agreement for Amendment for Petroleum Concession No. 34, 36, 37, 63, 64, 80, 81 and 65 dated January 20, 1966;

(e) Libyan Petroleum Law No. 25 of 1955, as amended;

(f) Law No. 7 of 1971, promulgated by Revolutionary Command Council of the Libyan Arab Republic;

(g) Law No. 42 of 1973, promulgated by Revolutionary Command Council of the Libyan Arab Republic;

(h) Agreement between Coastal and Arabian Gulf Exploration Company ("AGECO") dated May 2, 1973;

(i) Agreement between Ashland Oil Company of California and Arabian Gulf Exploration Company, dated April 11, 1973;

(j) Assignment of Ashland-AGECO Contract to Coastal;

(k) Processing Agreement between Coastal and Montedison dated June 10, 1963;

(l) Agreement between BP and Libyan Government dated November 20, 1974; and

(m) Agreement between Hunt and Libyan Government dated May 19, 1975.

The foregoing listing of documents is not intended to exclude by omission any documents constituting precedent or authority on any international law questions which may properly be adduced, including diplomatic notes, judicial precedent, writings and the like or documents relevant to the qualification of witnesses.

IV. OTHER DOCUMENTARY EVIDENCE

The parties have not stipulated to but the Court finds the following documents to be relevant, admissible and authentic for purposes of the December 6, 1976, hearing and subject to its ultimate determination of the legal issues above.

(a) Letter of August 3, 1973, from William J. Casey to G. Henry H. Schuler of Nelson Bunker Hunt;

(b) Excerpt of the Foreign Broadcast Information Service Daily Report (a U.S. Government publication) dated June 12, 1973, containing a transcription and translation of Libyan Law No. 42 issued on June 11, 1973;

(c) U. S. Department of State Press Release No. 630 of December 30, 1975;

(d) Excerpt of the Foreign Broadcast Information Service Daily Report (a U. S. Government publication) dated June 12, 1973, pgs. T-4 to T-11, containing a transcription and translation of a speech made on June 11, 1973, by Libyan Chairman Mu'ammar al-Qadhafi;

(e) Statement by the Department of State on Policy on "Hot" Libyan Oil; and

(f) United States of America's Note Verbale No. 59 dated July 5, 1973 and the attached certification by W. H. Holm.

V. STIPULATED FACTS

The following facts have been stipulated by the parties for purposes of the hearing referred to in Section I, above:

(a) Hunt and BP discovered oil on Concession 65 in 1961.

(b) Hunt and BP subsequently developed an oil field on Concession 65, known as the "Sarir Field", constructed physical facilities thereon and a pipeline from such Field to Marsa-al-Hariga/Tobruk, Libya.

(c) Hunt and BP produced, sold, and exported oil pursuant to Concession 65 from the Sarir Field from January 12, 1967, to December 7, 1971, when the interest of BP was expropriated.

(d) Hunt produced, exported, and sold his share of the oil produced from the Sarir Field from December 7, 1971, to May 24, 1973, when his interest in Concession 65 was expropriated by the Libyan Government.

(e) On December 7, 1971, there were oil companies other than BP, holding concessions other than No. 65, which were not expropriated, in whole or in part, and no other such company was expropriated on that date.

(f) On May 24, 1973, and on June 11, 1973, there were oil companies other than Hunt, holding concessions other than No. 65, which were not expropriated, in whole or in part, and no other such company was expropriated on that date.

(g) Arabian Gulf Exploration Company is the Government company to which the Libyan Government purported to transfer the interests in Concession 65 expropriated from BP and Hunt.

(h) Pursuant to its contract with Arabian Gulf Exploration Company and the assignment to it of the contract between Ashland and the Arabian Gulf Exploration Company, Coastal took possession of Sarir crude oil.

(i) Coastal first took possession of oil produced from the Sarir Field on May 29, 1973.

(j) Coastal transported all crude oil from the Sarir Field of which it took possession to the Montedison Refinery in Italy pursuant to the Processing Agreement referred to in Paragraph (k) above.

(k) Products derived or processed under the Processing Agreement accumulated to Coastal States' account at the Montedison Refinery and were sold by Coastal States to third parties pursuant to contracts between Coastal States and such third parties.

(l) At least a portion of such products were taken from the Montedison Refinery in Italy to points in the United States of America; provided, however, that it is not stipulated that Coastal States transported or caused to be transported any of the products derived from the Montedison Refinery under the Processing Agreement to the United States.

(m) Nelson Bunker Hunt, Herbert Hunt, and Lamar Hunt are citizens of the United States of America.

(n) Coastal is a company incorporated and headquartered in the United States of America.

(o) All subsidiaries of Coastal are companies incorporated and headquartered in the United States of America.

(p) Coastal consolidates its financial information for reporting and income tax purposes with its wholly owned subsidiaries.

(q) Among its wholly owned subsidiaries is Coastal States Marketing, Inc.

(r) Coastal derived proceeds from sales, exchanges, or other dispositions of products refined or derived under the Processing Agreement.

(s) The basis for calculation of the sum paid to Hunt by the Government of the Libyan Arab Republic pursuant to the Agreement between such parties of May 19, 1975, was the net book value of Hunt's physical assets located on Concession 65, i.e., such calculation and sum did not include oil previously sold by AGECO or for oil in place.

VI. THE SETTING OF FINAL PRELIMINARY HEARING AND DISCOVERY CUTOFF

1. At 1:00 P.M. on January 4, 1977, a preliminary hearing shall be held for the resolution of any matters required prior to jury selection in this cause.

2. Effective at the convening of such final preliminary hearing, there shall be no further discovery of any kind or character instituted except upon express consent of all parties affected.

VII. SETTING OF JURY SELECTION

Jury selection shall begin in this cause at 9:00 A.M., January 17, 1977, and jury trial shall thereafter follow from day to day until completion.

ORDERED this 22nd day of November, 1976.

Paul Pressler,
Judge Presiding

APPROVED

SHANK, IRWIN, CONANT, WILLIAMSON & GREVELLE

BY

A. B. Conant, Jr.
Cecil W. Casterline
Attorneys for Hunt, et al

FULBRIGHT & JAWORSKI

BY

Dan Matthews
Attorneys for Coastal States Gas Producing Company

APPENDIX F

Second Schedule

THE CONCESSION

THIS DEED OF CONCESSION is concluded on the eighteenth day of December, 1957, under the Petroleum Law of 1955:

Between

The Petroleum Commission (hereinafter called the Commission) in the name of the Province of Cyreniaca and with the approval of the Minister

and

NELSON BUNKER HUNT (hereinafter called the Company) having its registered office at 700 Mercantile Bank Building, Dallas, Texas, U.S.A., represented by Phillips L. Hynes who is legally authorized to act on behalf of the Company by virtue of a Power of Attorney dated May 4, 1956 which has been produced by him.

THE CONCESSION

Clause 1. Grant of Concession .....
" 2. Surrender of Concession Area .....
" 3. Renewal of Concession .....
" 4. Working Obligations .....
" 5. Company to Follow Good Oil Field Practices .....
" 6. Surface Rents .....
" 7. Royalty .....
" 8. Taxation on Profits .....
" 9. Method of Making Payments .....
" 10. Exemption from Certain Import and Export Duties .....
" 11. Exchange Control .....
" 12. Ancillary Rights .....
" 13. Transport Rights .....
" 14. Right to Occupy Land .....
" 15. Company's Labour .....
" 16. Company's Rights Ensured .....
" 17. Savings for Rights of Government and Others .....
" 18. Employment and Training of Libyans .....
" 19. Water Disposal and Plugging of Boreholes .....
" 20. Reports to be Furnished .....
" 21. Inspection .....
" 22. Measurement of Petroleum .....
" 23. Address of Local Manager .....
" 24. Force Majeure .....
" 25. Assignment .....
" 26. Right to Remove Property .....
" 27. Revocation .....
" 28. Arbitration .....
" 29. Interpretation .....
" 30. Fee .....

*Starting at the intersection of 21° longitude and 28° latitude thence east till 23° longitude thence south till 27° latitude thence west till 22° 30′ longitude then south till 26° latitude thence west till 21° 30′ longitude thence north till 27° latitude thence west till 21° longitude thence north till point of origin.

Seal of Petroleum Commission

CLAUSE 1.

Grant of Concession

In consideration of the undertaking by the Company to make the annual payments and pay the fees, rents and royalties hereinafter prescribed and to perform and observe the terms and conditions of this Concession, the Commission hereby grants to the Company, subject to the conditions hereof and the provisions of the Law, the exclusive right for a period of fifty years to carry out geological investigations, including aerial surveys, and to search for by any other means, bore for, and extract petroleum within and over the area outlined in red on the map annexed hereto of approximately 32944 square kilometres, situated in the 3 Zone bounded and defined as follows:

The Company shall also have the right to take away such petroleum whether by pipeline or otherwise from the concession area and to use, process, store, export and dispose of the same.

CLAUSE 2.

Surrender of Concession Area

In accordance with Article 10 of the Law the Company shall progressively reduce the area of the Concession and shall have the right at any time to surrender the whole or

any part of the Concession area. On the period coming through Appendix A to this contract and which is part of it, the surrender must be done according to what is said in the mentioned Appendix.

CLAUSE 3.

Renewal of Concession

The Concession may be extended for any period such that the total duration shall not exceed 60 years.

If the Company requires a renewal it shall submit to the Commission an application in writing for such renewal not more than five years and not less than three years before the end of the term of this concession.

The Commission shall advise the Company of its decision within one year of the receipt of the application.

CLAUSE 4.

Working Obligations

1. The Company shall, within eight months from the date of the grant of this concession, commence operations to explore for petroleum within the concession area according to the work program, fixed in Appendix A to this contract which if part of it, and shall diligently prosecute all its operations under the concession in a workmanlike manner and by appropriate scientific methods. In furtherance thereof the Company shall spend in Libya or elsewhere on, or in connection with, the said operations including general organization, overhead and administrative expenses connected therewith such sums as may be required in order to comply with the provisions of Article 11 of the Law.

2. Any sum spent during any of the working periods specified in Article 11 of the Law in excess of the minimum

sum prescribed for that period shall be carried forward as a credit to the Company against the expenditure requirements for the following period or periods.

CLAUSE 5.

Company to follow Good Oil Field Practices

The Company shall carry on all its operations under this Concession in accordance with good oil field practices and so that when petroleum is found it shall be produced in reasonably substantial quantities having regard to the world demand for petroleum and economic exploitation of the petroleum resources of the concession.

CLAUSE 6.

Surface Rents

The Company shall in accordance with Article 13 of the Law and Clause 9 (2) of this Concession pay the following surface rents for each 100 square kilometers held:

Five pounds for each of the first 8 years

Ten pounds for each of the next 7 years

or until petroleum is found in commercial quantities whichever is the earlier and £L2,500 for each year thereafter.

CLAUSE 7.

Royalty

(1) The Company shall pay a royalty of twelve and one-half per centum of the value on the field of production of all petroleum (excluding natural gas) won and saved into field storage, freed of water and foreign substances, and of all natural gasoline recovered by the Company from the concession area, after deduction of the quantities of such petroleum, petroleum products and natural gasoline used by the Company in the course of its operations hereunder.

(2) The value of crude oil under this clause shall be:

(a) The average free competitive market price during the previous quarter f.o.b. Libyan seaboard terminal of crude oil of the same or nearest comparable type with such adjustments for quality and gravity as normally prevail in the oil industry minus handling charges and costs of transportation from field storage;

(b) In the absence of a price f.o.b. Libyan seaboard terminal under sub-paragraph (a) hereof, the average free competitive market price during the previous quarter f.o.b. at the nearest seaboard terminal outside Libya for which such a price is published for petroleum of reasonably similar quality and gravity with such adjustments for quality gravity and location as normally prevail in the oil industry to arrive at a fair competitive market price f.o.b. Libyan seaboard and minus handling charges and the costs of transportation from field storage to Libyan seaboard terminal.

(3) The value of natural gasoline and petroleum other than crude oil and natural gas shall be calculated in a manner to be agreed upon from time to time between the Director and the Company. From such value shall be deducted the cost of its extraction and processing.

(4) The Company shall also pay a royalty of twelve and one-half per centum on the sale price less the cost of transport from the wellhead to the place of sale realized in respect of all natural gas derived from the concession area and sold by the Company in Libya. The royalty on natural gas exported shall be based on the sale price at the point of sale after deducting handling charges, duties and impests and costs of transportation from the wellhead.

CLAUSE 8.

Taxation and Division of Profits

(1) The Company shall pay such income tax and other taxes and imposts as are payable under the Law of Libya but shall not be subject to any form of taxation or other exaction of such a nature as to render it liable to taxation or other dues not payable by companies in general operating in Libya other than fees, royalties and surface rents made payable under this Concession and the Law:

Provided however that —

(a) if in respect of any complete year after the effective date as hereinafter defined the total amount of the fees, rents, royalties, income taxes and other taxes and imposts for which the Company is liable in respect of operations and income therefrom under all the petroleum concessions held by the Company in Libya falls short of 50% of the Company's profits as hereinafter defined during that year, the Company shall pay to the Government such sum by way of surtax as will make the total of the Company's payments equal to 50% of such profits;

(b) if in respect of any complete year after the effective date the total amount of the fees, rents, royalties, income taxes and other taxes and imposts for which the Company is liable as aforesaid exceeds 50% of the said profits of the Company during that year, the Company shall be entitled to deduct from the total payments to be made to the Commission a sum equal to such excess. If the sum which the Company is entitled to deduct exceeds the Company's unpaid liability in any year the excess shall be considered as

an advance payment of any sums payable to the Commission in the following year or years.

(2) In this Clause —

"effective date" means the date on which the Company first reaches a level of regular exports of petroleum averaging 15,000 barrels a day measured over a period of 30 consecutive days under all its concessions in Libya or the expiry of 4 years from the date when petroleum is first exported regularly by the Company, whichever is the earlier;

"profits" for the purposes of paragraph (1) (a) and (b) mean in respect of any year the increase of the Company obtained from all its petroleum exploration, development, prospecting and producing activities in Libya in that year after deducting:

(a) all expenses and losses, except fees, rents, royalties, income taxes and other taxes and imposts payable, incurred by the Company in carrying out such activities and properly attributable thereto irrespective of where incurred. Exploration and prospecting expenses, intangible drilling costs as defined in the Regulations, to the extent such expenses and costs are not incidental to the procurement or installation of physical assets, the cost of drilling wells not productive of petroleum in commercial quantities and expenses of organizing and initiating petroleum operations in Libya, may be deducted in the year in which they are incurred or they may be capitalized and amortised as provided below. The election to deduct or to capitalize as aforesaid may be made annually by the Company. The unamortised balance of the cost of physical assets abandoned during the year may be deducted in the year of abandonment;

(b) an amount in respect of amortisation during that year of capital expenditures on physical assets used in connection with such operations, and of expenses incidental to their procurement and installation, computed in the case of all such expenditures incurred before the effective date, irrespective of the date incurred, at a rate, not exceeding 20% per annum, to be elected annually by the Company, until all such expenditures are fully amortised; and in the case of all such expenditures incurred on or after the effective date, at a rate not exceeding 10% per annum, to be elected annually by the Company, until all such expenditures are fully amortised;

(c) each year for depletion allowance irrespective of the amounts so deducted in any previous years, an amount equal to 25% of the gross income of the year, as hereafter defined, but limited to 50% of the profits of the year computed after deduction of the amounts specified in sub-paragraphs (a) and (b) above but before deducting the amounts specified in this sub-paragraph. Gross income for the year for the purposes of calculating this depletion allowance shall consist of income derived from the disposal of petroleum produced by the Company in Libya, less the cost of handing and transporting it to the place of such disposal. In lieu of the aforesaid deduction the Company may in any year deduct an amount for amortisation of all capital expenditures made in connection with such operations other than those made on physical assets, incurred before the effective date, irrespective of the date incurred, at the rate of 20% per annum, and in the case of such capital expenditures incurred on or after the effective date at the rate of 5% per annum until such expendi-

tures have been fully amortised by virtue of all deductions made under this sub-paragraph (c).

(3) Where in respect of any year the total of the deductions taken under paragraph (2) of this Clause exceeds the gross income in respect of that year before taking the said deductions, the excess shall be carried forward and, as far as may be, deducted from the profits of subsequent years up to a maximum of 10 years.

(4) If the Company shall participate in joint operations, it may, in respect of such operations, report its rateable proportion of income therefrom and expenses therein and make all permitted elections independently of other companies participating in the joint operations, provided that one or more of the companies in the joint operations is carrying out other independent operations in Libya under the Law. Income and expenses so reported may be consolidated with those in respect of other operations being carried out by the Company in Libya under the Law.

(5) In computing profits as herein defined sound accounting practices usual in the petroleum industry shall be employed.

CLAUSE 9.

Method of Making Payments

(1) The fees, surface rents, royalties and surtaxes payable hereunder and income taxes shall be paid by the Company to the Commission. The collection of such sums shall be subject to the procedure provided by the Financial Laws and Regulations of Libya.

(2) The Company shall pay the surface rents specified in Clause 6 hereof annually in advance until such time as

royalty becomes payable by the Company under Clause 7 hereof. Thereafter surface rents and royalties shall be calculated in respect of each quarter and shall be paid by the Company to the Commission within 60 days after the last day of the quarter. Sums payable by way of surface rents under Clause 6 hereof in respect of any quarter shall be reduced by the amount of any royalty payable hereunder in respect of the same quarter.

CLAUSE 10.

Exemption from certain import and export duties

(1) The Company or any contractor employed by the Company may import free of duty, plant, machinery, tools, equipment and materials together with such other goods as may be specified from time to time in Regulations issued under the Customs Law intended to be used in Libya for petroleum exploration, prospecting, mining, transporting, processing operations and activities connected therewith. Provided, however, that such exemption shall not apply to any goods included in this paragraph which are available in Libya of suitable type and reasonably comparable quality, and at no higher price, provided that in comparing prices to the price of the imported goods shall be added Customs duties and other expenses incurred up to the time the imported goods reach Libya.

(2) Other goods which are dutiable under the Customs Law shall be subject to the payment of the appropriate duty.

(3) If the Company or any contractor, as the case may be, intends to sell or transfer any goods which have been imported free of duty under paragraph (1) hereof, a declaration shall be made to the Department of Customs before such sale or transfer is effected and, unless such goods

are sold or transferred to another company or contractor entitled to the same exemptions, such import duty shall be paid as may be assessed by the Director General of Customs in accordance with the Customs Law;

(4) Petroleum or any of its derivatives, produced in Libya, and any goods imported free of duty under paragraph (1) hereof may be exported free of Customs duty and without an export license subject to the policy of the Government regarding exports in general and to such restrictions as the State may impose by Law on production and exports during a state of war or emergency.

CLAUSE 11.

Exchange Control

The Company shall be subject to the normal exchange control applicable in Libya provided however that:

(a) the Company shall be entitled to retain abroad all funds acquired by it abroad including the proceeds of sales insofar as such funds may exceed the Company's requirements for the purposes of its operations in Libya, but statements of foreign exchange holdings or proceeds of sales of Libyan petroleum shall be rendered to the Libyan National Bank in such form and at such periods as it may require;

(b) the Company shall be entitled to remit any funds held by it in Libya in excess of its requirements in Libya on the primary currency in which the Company's investment in operations under this concession was made, to the country from which the primary currency originated;

(c) the Company shall be entitled to buy and sell solely for the purposes of its own operations in Libya and remittances under paragraph (b) above any currency whether Libyan or otherwise at the most favorable rate of exchange available through authorized banking channels to any other buyer or seller in Libya of such currency;

(d) no restriction shall be placed on the importation of funds by the Company for the purpose of carrying out its operations under this concession.

CLAUSE 12.

Ancillary Rights

For the purpose of its operations under this concession the Company shall have the following rights in the concession area:

(a) with the approval of the Director, to drill for water and impound surface waters and to establish systems for the supply of water for its operations and for consumption by its employees;

(b) with the approval of the Director to carry away and use in Libya materials such as gravel, sand, lime, gypsum, stone and clay which shall be free of charge in the case of such materials taken from lands other than private lands;

(c) to erect, set up, maintain and operate houses, fences, engines, machinery, furnaces, buildings, pipelines, storage tanks, compressor stations, pumping stations, processing plants, field roads and all other constructions, installations and works required in further-

ance of its activities. The Company may likewise for such purposes, erect, set up, maintain and operate all other communication and transportation systems and facilities but shall not do so, other than for temporary purposes, unless drawings of and locations for their sites have been submitted to and approved by the Director.

CLAUSE 13.

Transport Rights

The Company shall have the right for the purposes of its operations to erect and operate a harbour and terminal facilities together with the necessary means of communication and transport between such facilities and any part of the concession area, provided that the consent of the appropriate authorities to the location of such works shall be obtained. Such consent shall not be unreasonably withheld or delayed. The Company shall likewise have the right under similar conditions to build and maintain pipelines elsewhere outside the concession area for the transport of petroleum produced under this concession. In exercising such right the Company may occupy land in accordance with the provisions of Clause 11 hereof and erect and maintain thereon any communication and transportation systems and facilities and other fixtures which it requires for the installation, servicing, maintenance and operation of such pipelines.

CLAUSE 14.

Right to occupy land

(1) The Company shall have the right to enter and occupy free of charge for the purposes of its operations under

this concession any land within the concession area other than private land, provided it is not then in the lawful occupation of some person.

(2) If the Company fails to agree with a private landowner or lawful occupier of other than private land as to the terms on which it may enter and occupy the land in question the Company shall immediately notify the Director. If the occupation is to be of a temporary nature, not exceeding one year, the Director shall authorize such temporary occupation upon deposit by the Company with the Commission of a sum by way of reasonable compensation to such landowner and/or lawful occupier for loss of use of and damage to the interest in the land as the Director shall determine. If the occupation is to be for a longer period than one year the Commission shall authorize occupation by the Company of the land in question upon deposit by the Company with the Commission of such sum by way of reasonable compensation as the Commission shall determine and the Commission shall direct appropriate proceedings to be taken to put the Company into possession of the land under the law from time to time in force, as if the Company's operations were in all respects a work of public utility. In the event of any dispute as to the nature and extent of the interests of claimants to the land or the amount of compensation payable by the Company, the Commission shall refer the dispute for determination by an appropriate court of Law and the Commission shall pay to the respective claimants such sum by way of compensation as may have been determined by the Court. The Commission shall pay to or obtain from the Company (as the case may be) the amount by which the sum deposited by the Company exceeds or falls short of the total compensation payable to the claimants.

(3) This concession shall not confer upon the Company the right to do any work within the precincts of cemeteries, places used for religious worship and places of antiquity as defined in the Antiquity Laws from time to time in force. Any works of art or antiquity discovered by the Company shall be subject to the law from time to time in force.

(4) No drilling or any dangerous operations shall be conducted within 50 metres of any public works or permanent buildings without the previous consent of the Director, and subject to such conditions as he may impose.

CLAUSE 15.

Company's Labour

Subject to the provision of any Immigration Laws in force at the time, the Company is hereby allowed to bring into the country such employees as may be necessary for its operations and the competent authorities shall facilitate the entry into exit from and movement within Libya of such employees and their dependents while such employees are engaged on the Company's operations, hereunder. The Company shall have the right so to arrange its labour shifts that all operations may proceed by day and by night and during public holidays.

CLAUSE 16.

Company's Rights Ensured

The Government of Libya, the Commission and the appropriate provincial authorities will take all steps necessary to ensure that the Company enjoys all the rights conferred by this Concession.

The contractual rights expressly created by this concession shall not be altered except by mutual consent of the parties.

CLAUSE 17.

Saving for Rights of Government and Others

Nothing in this concession shall be deemed to limit the right to grant concessions in respect of minerals other than petroleum in the concession area, or generally to limit the rights of the Government or any authority or person in the concession area, save as expressly provided herein; provided always that the Company's operations hereunder are not thereby endangered or interfered with nor its rights hereunder prejudiced. The Company shall not obstruct the exercise of any such right, but shall afford the holder thereof and of any concession holder as aforesaid, every reasonable facility for the exercise of their rights.

CLAUSE 18.

Employment and Training of Libyan Subjects

(1) Provided that the requisite number having adequate skill and ability is available, the minimum number of Libyan subjects employed by the Company in Libya after 10 years from the date of commencement of operations shall have reached at least 75% of the total number of persons employed by the Company in Libya.

(2) The Company shall as from the date of commencement of regular exports from Libya of petroleum in commercial quantities produced in the concession area make an annual payment to the Libyan Government of not less than £L2,500 and not more than £L5,000, which payment shall be applied towards giving Libyan subjects such technical training as may be agreed upon by the Director and the Company, in order to fit them for employment in the petroleum industry or in related undertakings, provided however that the Company may each year reduce such pay-

ments by the amount which during that year it expended for the training and education of Libyan subjects for such purposes in Libya or abroad.

CLAUSE 19.

Water Disposal

Plugging of Boreholes and Wells

The Company shall, in accordance with good oil field practices, provide an adequate system for the disposal of its water and waste oil, and shall securely plug all bore-holes and wells made by before they are abandoned.

CLAUSE 20.

Reports to be furnished

(1) The Company shall at its own expense furnish to the Director during the first quarter of each year a report of the progress of its operations in the concession area during the preceeding year. This report shall contain:

(a) a statement of the number of bore-holes and wells drilled, including bore-holes and wells drilled in search of water, and of the depth of each, with a plan showing their location if the Director so requires;

(b) a statement of any petroleum, water or valuable minerals encountered during the course of the Company's operations;

(c) a statement of all petroleum, produced, of gas sold, and of natural gasoline recovered;

(d) a statement of the amount of water produced with the oil and natural gas;

(e) the nature and extent of geological and geophysical surveys carried out;

(f) a general survey of the operations; and

(g) a statment showing the number of Libyan subjects and nationals of other countries employed by the Company in Libya.

(2) The Company shall furnish to the Director not less than 30 days before the end of each year a statement of the general programme it intends to carry out during the following year.

(3) The Company shall keep accurate financial records of its operations under this concession which records shall be open to inspection by the appropriate authorities.

(4) The Company shall furnish such further information relating to its operations in the concession area as the Director shall reasonably require.

(5) The Company shall keep accurate geological and geophysical plans, maps and records relating to the lands within the concession area.

(6) On the discovery of oil or gas, the Director shall immediately be informed of such discovery.

(7) All information furnished by the Company under this clause shall (except with the consent in writing of the Company) be treated as confidential.

CLAUSE 21.

Inspection

The Chairman and other members of the Commission, the Director and other competent officials shall have the

right to enter the premises of the Company and inspect its work, books, registers and papers to ensure the proper implementation by the Company of the provisions of the Law, the Regulations and decisions made hereunder and the provisions of this Concession.

CLAUSE 22.

Measurement of Petroleum

The Company shall measure and record by methods customary in good oil field practice all petroleum and natural gasoline produced and saved by the Company within the concession area as if freed of water and other foreign substances. The Director or any official designated by him shall be entitled to attend such measuring and to examine and test the accuracy of the appliances employed therein and to examine the records thereof. The Company shall assist such official in the performance of his duties under this Clause. If any such measuring appliance shall at any time be discovered to be inaccurate, the same shall, if the Director so decides, be deemed to have existed in the condition for a period of 90 days prior to the discovery of such inaccuracy, or for the period elapsed since the last occasion upon which the same was examined or tested, whichever shall be the less, and the Company's records shall be adjusted accordingly.

CLAUSE 23.

Address of Local Manager

The Company shall before commencing operations furnish to the Director the name and address of the Manager of the Company's operations under this concession. Any notice required to be served on the Company shall be sufficiently

served if delivered at, or sent by registered post to, the Manager at such address.

CLAUSE 24.

Force Majeure

Failure by the Company to carry out any of the provisions of this Concession shall not give rise to any claim or be deemed to be a breach of this Concession, if it be shown that the failure has arisen from force majeure, namely Act of God, insurrection, riots, war, strikes of workmen, or any other unforeseen circumstances beyond the control of the Company. If by reason of force majeure the fulfilment by the Company of any of the terms, and conditions of this Concession or the enjoyment of its rights under the Concession is delayed the period of such delay shall be added to the period fixed herein for such fulfilment or enjoyment.

CLAUSE 25.

Assignment.

(1) The Company may assign this Concession in whole or in part to one or more companies if the assignee:

(a) controls the assignor, or

(b) is controlled by the assignor, or

(c) is controlled by one or more companies who themselves control the assignor provided that in the aforesaid cases the control may be direct or indirect, and provided that the assignee satisfies the conditions laid down in Article 5 of the Law.

(2) In other cases assignment may not be made except with the consent of the Commission, and subject to such conditions as it may deem appropriate.

CLAUSE 26.

Right to remove property

On the surrender of any area and on the expiration or earlier determination of this concession, the Company shall, except as hereafter in this clause provided, be entitled to remove all its property of whatever nature situated within the surrendered area or the concession area as the case may be. Well casings and well heads may not however be removed unless adequate protective measures are taken to the satisfaction of the Director. Fixtures necessary to control the flow of gas or liquid from the well head may not be removed without the approval of the Director. No taxes, duties or charges whatsoever other than any specifically made payable hereunder, shall be imposed in connection with such removal. The Director, may, however, within a period of 30 days following any surrender or expiration or earlier determination, elect to purchase any property which theretofore was used by the Company solely and exclusively in connection with its operations within the surrendered area or the concession area. Such purchases will be made at a fair price to be determined by agreement between the Director and the Company. Failing such agreement the matter shall be referred to an independent expert or panel of experts as may be agreed between the Director and the Company. Such panel shall consist of one member to be appointed by the Director, another member to be appointed by the Company and a third member to be chosen by the two members appointed. The expert or panel, as the case may be, shall determine what, in the circumstances, is a fair price for the property. The wells and any well casings, well heads and fixtures not removed as aforesaid shall be handed over to the Director free of charge within 30 days following the surrender or expiration or earlier de-

termination. The Director may require the Company to restore the surface of the land to a reasonable condition in accordance with good oil field practice, taking into account normal wear and tear caused by the Company's operations thereon.

CLAUSE 27.

Revocation

(1) The Commission may, by notice in writing to the Company, revoke this Concession in the following circumstances but not otherwise:

(a) the Company fails to commence operations within 8 months as required by Clause 4 or fails to meet its expenditure obligations within each of two consecutive periods specified in Article 11(1)(a) and (b) of the Law, or

(b) any surface rents or royalties payable under this Concession are in arrears for six months after the date on which they ought to have been paid in accordance with Clause 6 and Clause 7; or

(c) the Company goes into liquidation except voluntarily for the purpose of reconstruction or amalgamation, or a receiver is appointed; or

(d) the Company fails to perform its obligations under Clause 2 or Clause 25; or

(e) any sum awarded against the Company in arbitration proceedings under the following clause has not been paid within 90 days of the date stipulated in the award;

Provided that the Commission shall give to the Company previous notice in writing of the breach and require the

Company to remedy the breach and pay compensation where appropriate within the period fixed by the Commission which shall not be less than 90 days; notice of revocation shall only be given if the Company has failed within the specified period to remedy the breach and pay compensation where appropriate.

(2) Whenever the Company disputes the grounds upon which revocation may be based and requests arbitration under Clause 28 hereof, the revocation shall only become effective subject to and in accordance with the result of the arbitration.

(3) Revocation shall be without prejudice to any liability incurred by the Company before revocation.

CLAUSE 28.

Arbitration

(1) Any dispute between the parties arising out of or in connection with this Concession, unless otherwise resolved, shall be settled by arbitration proceedings between the Commission as one party and the Company as the other party and such proceedings shall determine the measures to be taken by the parties including, if appropriate, payment of compensation, to put an end to or remedy the damage caused by any breach of this Concession.

(2) The institution of proceedings shall take place upon the receipt by one party from the other of a written request for arbitration. Each party shall within thirty days of the instituton of proceedings appoint an arbitrator. If the arbitrators fail to settle the dispute they shall appoint an umpire within sixty days of the institution of proceedings. If they do not do so either party may request the President, or, if the President is a national of Libya or of the country in which the Company was originally registered, the Vice-President of the International Court of Justice, to make the appointment.

(3) If either of the parties within sixty days of the institution of proceedings either fail to appoint its arbitrator or does not advise the other party of the appointment made by it, the other party may request the President or, if the President is a national of Libya or of the country in which the Company was originally registered, the Vice-President of the International Court of Justice to appoint a sole arbitrator who shall hear and settle the dispute alone.

(4) The umpire, however appointed, or the sole arbitrator shall not be either a national of Libya or of the country in which the Company was originally registered; nor shall he be or have been in the employ of any party to the Concession or of the Government of the aforesaid country.

(5) Should the International Court of Justice be replaced by or its functions be substantially transferred to any new international tribunal, the functions of the President or Vice-President (as the ease may be) of the International Court of Justice exercisable under this Concession shall be exercisable by the President or Vice-President (as the case may be) of the new international tribunal without further agreement between the parties hereto.

(6) The procedure of arbitration shall be determined by the umpire or the sole arbitrator who shall be guided generally by the relevant rules of procedure established by Articles 32-69 inclusive of the rules of the International Court of Justice of 6th May, 1916. The umpire or sole arbitrator shall likewise fix the place and time of the arbitration.

(7) This Concession shall be governed by and interpreted in accordance with the Laws of Libya and such principles and rules of international law as may be relevant, and the umpire or sole arbitrator shall base his award upon those laws, principles and rules.

(8) There shall be no appeal against the award and the parties to this Concession shall faithfully abide thereby.

(9) The expenses of the arbitration shall be borne by the parties in such proportion and manner as may be provided in the award.

CLAUSE 29.

Interpretation

(1) Words defined in the text of the Petroleum Law 1955 shall have the same meaning in this Concession.

(2) In this Concession:

"the Law" means the Petroleum Law of 1955;

"the Director" means the Director of Petroleum Affairs;

"land" means territory under the control and jurisdiction of the United Kingdom of Libya and includes marshes, ground underlying lakes or rivers and the seabed and subsoil beneath territorial waters and the high seas continuous thereto;

"concession area" means the area over which for the time being the Company enjoys the rights conferred upon it hereunder;

"crude oil" means any unrefined oil consisting primarily of hydrocarbons;

"natural gasoline" means any liquid hydrocarbon obtained from natural gas by any chemical or physical process;

"natural gas" means any subsoil gas consisting primarily of hydrocarbons;

"quarter" means a three month period of a year beginning on 1st January, 1st April, 1st July or 1st October as the case may be.

CLAUSE 30.

Fees

This Concession is granted on payment of a fee of £L500.

(Signed) Anis Qasem

For the Commission

(Signed) Mohammed Bu Dajaja

The Minister

(Signed) Phillip L. Hynes

For the Company
Company's Seal

Date 18. 12. 1957

Corresponding to .....

APPENDIX A

The Company undertake to start drilling for oil during three years from the date of the grant of the Concession or it will surrender the Concession area completely.

The Petroleum Commission Seal

The signature of Mr. Hynes

ROYAL DECREE

AMENDING THE PETROLEUM LAW OF 1955.

Having seen Article 64 of the Constitution,

Article 25 of the Petroleum Law 1955, and

Acting on what has been submitted to us by the Minister of National Economy and with the approval of the Council of Ministers,

WE, IDRIS THE FIRST, King of the United Kingdom of Libya,

Decree as follows:

ARTICLE 1.

The first paragraph of Article 25 of the Petroleum Law of 1955 is hereby amended to read as follows:

"(1) This Law may be cited as the Petroleum Law of 1955 and shall come into force thirty days after publication in the Official Gazette with the exception of articles 2 and 24 which shall come into force on publication."

ARTICLE 2.

The Minister of National Economy shall carry out this Decree which shall take effect on publication.

IDRIS

Given at Dar-As-alaam Palace on 29th Ramadan 1374 h.
Corresponding to 1st May 1955, g.

By Order of the King
ABDUL MAJID KU'BAR
For the Prime Minister

SALEM AL-QADI
Minister of National Economy

ROYAL DECREE

FORMING THE PETROLEUM COMMISSION

Having seen Article 2 of the Petroleum Law of 1955,

The Royal Decree given on 29th Ramadan 1374 amending the aforesaid Law, and

Acting on what has been submitted to us by the Prime Minister on concurrence with the competent authorities of the Provinces, and with the approval of the Council of Ministers,

WE, IDRIS THE FIRST, King of the United Kingdom of Libya,

Decree as follows:

ARTICLE 1.

The following are hereby appointed as members of the Petroleum Commission:

Assayyed Anis Al-Qasim
Assayyed Abu Bakr Ahmad
Assayyed Muhammed Assifat
Assayyed At-Taher Al-Bishti

ARTICLE 2.

The Commission hereinbefore mentioned shall elect its own chairman.

ARTICLE 3.

The Prime Minister shall carry out this Decree which shall come into force on publication.

IDRIS

Given at Dar-A-alaam Palace on 29th Ramadan 1374 h.
Corresponding to 21st May 1955, g.

By Order of the King

ABDUL MAJID KU'BAR
For the Prime Minister

APPENDIX G

TEXT OF LIBYAN LAW NO. 42 OF 1973 NATIONALIZING NELSON BUNKER HUNT'S INTERESTS IN CONCESSION 65

(The following is a MEES translation of the official Arabic text of Libyan Law No. 42 of 1973 nationalizing the half-share interest of US indpendent Nelson Bunker Hunt in Concession 65 in Libya, which was promulgated by Libya's Revolutionary Command Council on 11 June 1973 (MEES, 15 June). The other half-share, originally owned by BP, was nationalized by Libya in December 1971.)

In the name of the people,

The Revolutionary Command Council,

After review of the Constitutional Proclamation No. 1 of 2 Shawwal 1389, corresponding to 11 December 1969; and Petroleum Law No. 25 of 1955 and the laws amending it; and Law No. 24 of 1970 relating to the National Oil Corporation and the laws amending it; and Law No. 115 of 1971 nationalizing the British Petroleum Company known as BP Exploration (Libya) Limited and establishing a national company known as the Arabian Gulf Exploration Company; and the Council of Ministers' decision of 5 Rabi' I 1392, corresponding to 19 April 1972, setting forth the articles of association of the Arabian Gulf Exploration Company; and Oil Concession Agreement No. 65 and the agreements relating to it; and in accordance with the proposal of the President of the Council of Ministers and the approval of the said Council, has issued the following Law:

ARTICLE 1

The rights of Nelson Bunker Hunt in Oil Concession Agreement No. 65 shall be nationalized, and ownership of all

the funds, rights, assets and shares of Nelson Bunker Hunt in the said concession shall revert to the State, including specifically all the rights relating to the installations and facilities for prospecting, exploration and drilling for, and production of, crude oil and natural gas, as well as for transportation, processing, storage and export, and other assets and rights relating to the said concession.

ARTICLE 2

All the funds, rights and assets of Nelson Bunker Hunt reverting to the State in accordance with the provisions of the preceding Article shall be assigned to the Arabian Gulf Exploration Company, established by Law No. 115 of 1971 referred to above.

The Arabian Gulf Exploration Company shall replace Nelson Bunk Hunt in so far as his rights and obligations in Oil Concession Agreement No. 65 are concerned, but shall not be responsible for previous obligations except within the limits of the funds, rights and assets reverting to the State as of the effective date of this Law.

ARTICLE 3

The Arabian Gulf Exploration Company shall have the right to implement existing crude oil sales contracts relating to the rights of the party concerned referred to in Article 1 above, or to annul them, as it deems appropriate in the public interest.

ARTICLE 4

The Arabian Gulf Exploration Company shall pay to the State Treasury through the Ministry of Petroleum all fees, rents, royalties and additional taxes imposed on Nelson Bunker Hunt, which fall due as of the effective date of this

Law in accordance with the provisions of the Petroleum Law and the concession agreement referred to above and the agreements amending it.

ARTICLE 5

The State shall pay compensation to the party concerned for the funds, rights and assets reverting to it by virtue of Article 1. The determination of the amount of the said compensation shall be undertaken by a committee to be formed by a decision of the Minister of Petroleum in the following manner:

(a) One judge of the Courts of Appeal as President, to be nominated by the Minister of Justice.

(b) One representative of the National Oil Corporation as a member, to be nominated by the Minister of Petroleum.

(c) One representative of the Ministry of the Treasury as a member, to be nominated by the Minister of the Treasury.

The committee may seek the help of any employees or other parties whose assistance it deems necessary in the performance of its task.

ARTICLE 6

The necessary sums for settlement of outstanding taxes, fees and any other payments due to the State Treasury and any debts connected with the nationalized rights shall be deducted from the amount of compensation due to the party concerned in accordance with the provisions of the preceding Article, within the limits of the amount of compensation.

Creditors of debts referred to in the preceding paragraph must submit a statement of the sums due to them, supported by documentary proof, to the committee provided for in Article 5 within a period not exceeding 30 days from the date of issue of the decision establishing it.

ARTICLE 7

The committee provided for in Article 5 must issue a decision estimating the compensation and determining the debts to be deducted from it, within a period not exceeding three months from the date of issue of the decision establishing it.

The decision of the committee shall be documented and final and shall admit of no appeal by any means, and it shall be communicated to the Minister of Petroleum who shall notify the party concerned within 30 days of the date of its issue.

ARTICLE 8

Employees and workers of Libyan nationality who are in the employ of Nelson Bunker Hunt shall be attached to the Arabian Gulf Exploration Company, and may not leave, or stay away from, their work unless they are relieved of it by a decision of the company's board of directors. Foreign employees and workers may choose between remaining in their work or leaving it. Libyan employees and workers, and foreigners who choose to remain in their work, shall retain their present salaries and wages.

ARTICLE 9

A committee shall be appointed by a decision of the board of directors of the Arabian Gulf Exploration Company to be

responsible for taking receipt of the funds, assets and rights of the party concerned, referred to in Article 1.

ARTICLE 10

Any contract, act or measure carried out contrary to the provisions of this Law shall be considered utterly null and void. Banks, organizations or individuals are prohibited from disbursing any sums or settling any claims or sums due from the party concerned, referred to in this Law, except with the approval of the board of directors of the aforementioned company.

ARTICLE 11

Any violation of any provision of this Law shall be punishable by imprisonment for a term not exceeding two years and a fine not exceeding LD 500, or by either of these two penalties. Moreover, any person violating the provisions of the preceding Article shall be sentenced to pay three times the sum forfeited by the State as a result of the violation.

ARTICLE 12

The Minster of Petroleum shall implement this Law, which shall be effective as of the date of its issue, and it shall be published in the Official Gazette.

Issued on 10 Jamada I 1393,
corresponding to 11 June 1973

The Revolutionary Command Council
Colonel Mu'ammar al-Qadhafi

Prime Minister
Major 'Abd al-Salam Jallud

Minister of Petroleum
'Izz al-Din al-Mabruk

APPENDIX H

UNITED STATES OF AMERICA
DEPARTMENT OF STATE

To all to whom these presents shall come, Greeting:

I Certify That Gerald A. Rosen, whose name is subscribed to the document hereunto annexed, was at the time of subscribing the same Acting Assistant Legal Adviser for Economic and Business Affairs, Department of State, United States of America, and that full faith and credit are due to his acts as such.

In testimony whereof, I, Henry A. Kissinger, Secretary of State, have hereunto caused the seal of the Department of State to be affixed and my name subscribed by the Acting Authentication Officer of the said Department, at the city of Washington, in the District of Columbia, this nineteenth day of October, 1976.

Seal of Department of State United States of America

HENRY A. KISSINGER

Secretary of State.

By HILDA S. O'CONNELL

Acting Authenticating Officer, Department of State.

This certificate is not valid if it is removed or altered in any way whatsoever

DEPARTMENT OF STATE
Washington, D.C. 20520

October 18, 1976

To Whom It May Concern:

I, Gerald A. Rosen, Acting Assistant Legal Adviser for Economic and Business Affairs of the Department of State of the United States of America, do hereby certify that the annexed copy of the excerpt of the Foreign Broadcast Information Service Daily Report (a U.S. Government publication) dated June 12, 1973, pgs. T-4 to T-11, containing a transcription and translation of a speech made on June 11, 1973, by Libyan Chairman Mu'ammar al-Qadhadhafi, is a true and faithful copy of the original document held in files under my custody at the Department of State, the same having been examined by me and compared with the said originals and found to agree therewith word for word and figure for figure.

Gerald A. Rosen
Acting Assistant Legal Adviser
for Economic and Business
Affairs
Department of State
United States of America

The meeting, held at the headquarters of the Libyan RCC, was attended by Libyan RCC members Maj. Abu Bakr Yunis, Maj. 'Abd as-Salam Jallud, Maj. 'Abd al-Mun'im al-Huni and Capt. 'Umar al-Muhayshi. It was also attended by President Anwar as-Sadat's secretary for information [words indistinct] Al-Qadhdhafi for information and the secretary of the Unified Political Command.

MENA has learned that the talks between the two sides will be resumed at 1000 tomorrow, Monday, at the People's Palace in Tripoli.

Ugandan President Amin Arrives

Tripoli Domestic Service in Arabic 1230 GMT 11 Jun 73 M

[Excerpt] Ugandan President Maj. Gen. Idi Amin arrived at Tripoli International Airport at 1330 today to participate in the third anniversary celebrations of the evacuation of the last U.S. soldier from the soil of the sacred homeland. The brother colonel [Mu'ammar al-Qadhdhafi] led those who received Amin at the airport.

As-Sadat, Al-Qadhdhafi Meetings Continue

Cairo MENA in Arabic 1000 GMT 11 Jun 73 M—FOR OFFICIAL USE ONLY

[Text] Tripoli—The meetings of the Unified Political Command between the Arab Republic of Egypt and the Libyan Arab Republic resumed today at the Guest Palace in Tripoli under Presidents Anwar as-Sadat and Mu'ammar al-Qadhdhafi. The meeting was attended on the Egyptian side by Ashraf Marwan, presidential secretary for information and secretary of the Unified Political Command; and on the Libyan side by RCC members Lt. Col. Abu Bakr Yunis,

Maj 'Abd as-Salam Jallud, Maj 'Abd al-Mun'im al-Huni, Maj Mustafa al-Kharrubi and Capt 'Umar al-Muhayshi and Capt Ahmad al-Maqsabi, Libyan presidential secretary for information and secretary of the Unified Political Command.

As-Sadat, Amin, Al-Qadhdhafi Meet

Tripoli Domestic Service in Arabic 2100 GMT 11 Jun 73 M

[Text] President Muhammad Anwar as-Sadat, Col Mu'ammar al-Qadhdhafi and Maj Gen Idi Amin held a meeting at the People's Palace in Tripoli at 2200 today. The meeting was attended by members of the RCC and Prime Minister Maj 'Abd as-Salam Ahmad Jallud, and secretaries of the Unified Political Command Brothers Col. Ahmad al-Bakri and Ashraf Marwan.

Al-Qadhdhafi Speaks at Celebrations

Tripoli Domestic Service in Arabic 1654 GMT 11 Jun 73 M

[Speech by Libyan Chairman Mu'ammar al-Qadhdhafi at the Martyrs Square in Tripoli on the anniversary of the evacuation of the U.S. troops from Wheelus Base — live and relayed simultaneously by Cairo Domestic Service and Cairo Voice of the Arabs]

[Text] In the name of God, the merciful and compassionate. Brothers, while we celebrate Evacuation Day, one of the achievements of the 1 September revolution, we miss on this day the presence of one of the soldiers of the 1 September revolution. On this day we miss one of the soldiers of the 1 September [revolution] — we miss Capt Muhammad al-Muqaryif. Since his death has been God's decree, we today cannot but exercise patience and read the first Sura for the repose of his soul.

Brothers, our celebration today marks the anniversary of the expulsion of the U.S. imperialist forces from our free land. [applause] This day comes as the gigantic 1 September revolution is entering a new stage of series revolutionary evolution — the stage of genuine popular revolution. This anniversary comes today while the Libyan people are marching to seize authority everywhere and to establish real popular authority. Therefore, the freedom which we have gained through evacuation has not turned into a song nor into a meaningless slogan. The fetters that were broken after the revolution and after the evacuation and the freedom we have gained have now turned into real work represented by the masses' assumption of popular authority in all fields. [applause] Thus the revolution has transcended the dangerous stage into which revolutions have often fallen and instead of turning into a popular revolution, have turned into a regime that could turn against the masses for whose sake the revolution had erupted.

It now gives me pleasure to greet His Excellency President Anwar as-Sadat in the name of the people of the Libyan Arab Republic, to greet the president whose presence among us today has a great significance. First of all, he represents the 23 July revolution, the pioneer revolution, the revolution which has opened the road to the revolutionary vanguards of the Arab nation after 1952, the revolution which has untiringly given to the Arab nation, the revolution which has been the teacher of the rest of the revolutions — the 23 July revolution which is represented by President Anwar as-Sadat —[applause] and the 1 September revolution is considered one of its strong tributaries, a genuine rejuvenation of it and a new step along its long path. President Anwar as-Sadat, who is among us today, represents the people of Egypt, the great people who have given to the Arab people

without limit — offered its sons, blood and food — and which continues to this day to stand fast in the face of the enemies of the Arab nation and those who have the ambition to occupy it.

Also, his presence among us today brings the good tidings that the day of complete unity between Egypt and Libya is near. From this place we send our greetings to the fraternal Egyptian people who are standing fast in defense of Arabism and Islam. We also send our greetings to the Egyptian Armed Forces which are awaiting the day of the decisive battle.

We also greet President Idi Amin, who was able to turn an African country — Uganda — from a backward country dominated by Zionist influence into one of the vanguard African countries fighting Zionist imperialism and Zionist racism in Africa. He was also able to place the Ugandan people on the path of liberation and in the vanguard, full of friendship for the Arab nation and supporting the legitimate Arab rights.

In your name, we announce our support of President Idi Amin and the fraternal and friendly Ugandan people.

We also greet the delegations celebrating with us today. They are the delegations of People's Republic of Congo, Guinea, Burundi, Central Africa [Republic] and Senegal.

Brothers: This day has great meaning; it is the victory of a small people over a big power. The United States had never believed that its huge bases on Libyan territory would be destroyed by this small people. The evacuation from the 'Uqbah bin Nafil base is a great lesson for all the peoples fighting for their freedom. It is also a good lesson for the big powers which think they cannot be defeated by the will of the peoples. But the will of the peoples stems from the

will of God. The United States with its huge bases and might was defeated by the small Libyan people. This is because this people possesses the will and the resolve to make sacrifices for the sake of freedom.

The United States, which has suffered defeats everywhere, has not yet been taught the final lesson, especially when we see it being quarrelsome in the Arab world and completely siding with Israel. The United States, which believes it is dominating the world with its oil monopolies, aggressive military bases and fleets, and which continues to provoke the peoples fighting for their freedom and independence — we say with a loud voice that this United States needs to be given a big hard blow on its cold insolent face in the Arab area.

U.S. policy, brothers, is going to lead to a catastrophe for U.S. interests in the Arab area in particular.

The time has come for the Arab peoples to confront the United States. The time has come for the U.S. interests to be threatened earnestly and seriously in the Arab area, regardless the cost. The U.S. haughtiness and imperialist arrogance is manifested in a number of challenges to the Arab nation. They are manifested in the fact that it challenges us with aircraft carriers and with spy planes while we are building our country and while we are seeking to defend our freedom. The United States is defying this will. Every now and then it threatens the Libyan regional waters. This is an addition to all the other attitudes of insolent defiance by this fierce imperialism. The United States is still scorning the Arab nation and its rights. It is continuously giving Israel the most modern arms to enable it to humiliate the Arab nation or to conquer at its will or to remain unjustly in the occupied territory. Also, U.S. (?arrogance) is now

manifested in the attitude of the oil companies which do not want to respond and submit to the will of the people who have the sovereignty — the people, owners of the wealth, owners of the oil who have the right of sovereignty over the oil wealth and who have the final and last word. In our negotiations with the American monopolist companies, we are facing U.S. arrogance and the imperialist spirit which does not heed right or logic. However, the time may come, if it has not already come, for the serious and dangerous confrontation to take place — a confrontation the cost of which we must bear — with the oil companies and with the entire U.S. imperialism. [applause]

On this occasion, the RCC of the Libyan Arab Republic has decided to nationalize the American oil company Bunker Hunt. [applause and cheers]

In the first place, this company lacks the legal standing [as-sanad al-qanuni] to carry out prospecting, exportation, or handle oil affairs, but what I want to say now is that, in the first place, this company lacks the legal standing qualifying it to carry out oil operations in the Libyan Arab Republic.

What I also want to say on this occasion is that the right of nationalization is the sovereign right of the state owning the oil. There is no law in the world preventing the states owning the oil from nationalizing their oil resources, running oil operations, stopping the flow of oil, or seizing all oil operations.

Furthermore, the peoples who follow the course of real revolution cannot under any circumstances stop half way. Freedom must either be complete politically and economically, or the struggle and the jihad must continue until freedom is achieved at all costs, whether by blood or (? funds).

Brothers: by taking action on the domestic [watani] sphere to achieve Libyan objectives, we are in fact serving the Arab national cause. Although the objectives are Libyan, they still express Arab will and Arab rights. As we celebrate the anniversary of the evacuation today, we, the Libyans, must understand that our freedom is still incomplete so long as some Arab territory is still occupied by the foreign enemy by force of arms. In order to achieve our complete freedom, and we must achieve complete freedom, we must continue the struggle on the path of Arab unity, the battle of liberation and sacrifices however costly they may be.

In the name of the Libyan people we greet today the states which have responded to the wish of the Libyan people — we have said that they are Libyan objectives but they also express the wish of the entire Arab nation — and recognized Arabic, the language of the revealed book, the Koran, and of the Arabs, as an international language. Arabic is not just the language of the Libyan people, but of the Arab nation from the ocean to the gulf. It is the right of this nation to salute today the numerically small Libyan people who are considered the tool expressing the will of this nation.

I was very sorry to learn that the FRG Foreign Ministry announced the day before yesterday that it will not follow the example of those states which recognized the Arabic language. This FRG Foreign Ministry statement, first, denotes unsuccessful diplomacy and, second, it denotes rancorous chauvinism against the Arab nation. It denotes racial fanaticism and chauvinism. It denotes disregard for the wishes, nationalism and languages of other nations.

On the other hand, the GDR, which we have not yet recognized and have no established relations with, has joined the

states which recognized the Arabic language. Consequently, the RCC has decided to recognize the GDR.

Brothers, as we make the real revolution in Libya we cannot ignore our pan-Arab role in the Arab region. Undoubtedly the massacre to which your brothers, the Palestinian fedayeen in Lebanon, are being subjected is not absent from your thoughts, feelings and conscience, despite the fact that you are engaged in the popular revolution and all its battles.

If there is anything for us to say in this respect, it is that the Libyan Arab Republic has given arms to the fedayeen from the beginning and still does so to this day. Wherever the fedayeen are, the Libyan arms will reach them. [applause]

The Libyan people, while making the revolution on their soil, are also honoring their duties to the Arab nation. We have a right today to uncover and expose the truth in Lebanon because the situation is no longer a diplomatic one warranting courtesy or silence or beating about the bush. What is happening in Lebanon and what may happen in Lebanon against the Palestinian people and their vanguard, the Palestinian resistance, constitutes a threat to the Palestine cause, because this is an imperialist plan in which the traitorous regimes are cooperating with Israel and Eastern and Western imperialists in order to do away with what is known as the Palestinian resistance so that everyone who has a claim in this matter is eliminated.

King Husayn has plotted with Israel and imperialism and destroyed the Palestinian resistance. Now, there is plotting in Lebanon. What might happen in the future could gravely harm the Palestinian resistance.

What we are seeing now is that there are popular forces in Lebanon supporting the Palestinian resistance [applause]

and opening their hearts and homes to it. There are other forces in Lebanon lying in wait for the Palestinian resistance. On this count they are in agreement with Israel and imperialism, as their aim is to destroy the Palestinian resistance, vanguard of the Palestinian people.

Quite frankly, we are speaking in Tripoli but we know that the Arab nation is now hearing the voice of the free Libyan people ringing loud with the truth. [applause] What we are saying clearly, what we now say frankly, will determine the pan-Arab political and military attitude of the Libyan Arab Republic in this field and region.

There is a crusade in Lebanon, and there is a crusade against the crusaders [Christians] in Lebanon. The masses of the Moslem population in Lebanon live as third class citizens although they are Lebanese citizens. They are the people who open their homes and hearts to the Palestinian resistance, which is the hope of the Arab nation. [applause]

There is a Lebanese Christian Maronite community which dominates the rest of the Arab Christian communities in Lebanon and looks upon non-Maronite Christians as second class citizens. Hence, from the viewpoint of the Libyan people who now carry weight in the Arab arena and who are affected by what happens in it, the position in Lebanon is that there are third class citizens, the Moslems in Lebanon; second class citizens, the non-Maronite Arab Christians; and first class citizens, who are the masters and the rulers. There is the Maronite community in Lebanon, except for some of its free members who form the well-known Nasirite and pro-unity movements in Lebanon.

We did not create this situation and we do not wish to incite any sectarianism in Lebanon, but this is a reality which affects Arab destiny. Therefore, the Libyan Arab Republic will be morally and materially committed in accordance with

this classification in Lebanon. We cannot see the Palestinian resistance being slaughtered and remain indifferent. [applause] We cannot see our Moslem brothers in Lebanon suffering from persecution and asking for help from the Libyan people and the 1 September revolution — we cannot turn a blind eye to this or shirk our duties. Also, we cannot see our Arab brethren — non-Maronite Christians — live as second class citizens and look to the 1 September revolution for support — we cannot see this and fail in our national duties toward them. Therefore, the Libyan Arab Republic adopts a national stand. This national stand is based on facts. These facts must be clear so that there will be no ambiguity in the Libyan Arab Republic's stand and so that the attempts of those who are trying to fish in troubled waters will be thwarted.

This situation has been created by Lebanon and by imperialism in Lebanon. This situation requires a remedy because it affects us and we are influenced by it, although it is not we who have created it and although we do not want it to exist.

With regard to the domestic field, we, the people's masses, are in control of power. A revolution which is unique in the world is being created. If the cultural revolution in China was the most important world event in the 1960's, the popular revolution in the Libyan Arab Republic is the most important world event in the 1970's. [applause] This people, who have proceeded on the road of revolution since the 1 September revolution and also in the years of preparation for this revolution, cannot stop halfway through. They must continue on the road of revolution to its end. Popular revolution can be achieved only when the masses assume power, only when the masses control all areas and rule them in a democratic and popular manner. [applause]

Thus, we today prove that evacuation has been the means to another end. The destruction of reaction has been the means to another end. What benefit will evacuation, the destruction of the bases, the destruction of reaction and the breaking of the fetters have if the people do not assume authority over their land and in their country and have the last word? On this basis, on the level of the popular revolution — if the occupation of the radio, if the masses' seizure of the radio stations and the news agencies is considered an escalation of the popular revolution and a new phase of the popular revolution, then the popular revolution, as of this day, shall be escalated again and introduced to a new stage which will not be the last stage but one of the stages through which it must pass in order to attain complete assumption of authority by the masses.

The student masses — the masses of the colleges of the universities in Tripoli and Benghazi — are called to seize the university administration and to achieve an administrative revolution in them. [applause] The teacher masses in all provinces are called to seize the directorates and inspectorates of the Ministry of Education in all provinces and to achieve administrative revolution in them. [applause]

The peasant masses in all provinces are called to seize the agricultural directorates and inspectorates and to achieve the revolutionary popular aims in them. [applause] The writers, men of letters and authors and the revolutionary intelligentsia in general — all these are called to seize the government printing presses and the cultural centers so they may be placed in the service of art and culture. [applause]

Gentlemen: This action which is considered an actual realization of the masses' assumption of authority in the republic and their management of all the departments which affect the life of the individual — management by the free indi-

vidual — all this entails a heavy burden; it entails serious responsibilities. I warn the student masses in the universities and the teacher masses and peasant masses as well as the writers, men of letters and the revolutionary intelligentsia who have been called upon to seize authority in the aforementioned departments — I warn them that enthusiasm should not outweigh rationality. Emotion should not outbalance reason. Impulseness should not dominate the feeling of serious responsibility. You are carrying out a unique experiment in the world. It is a test for the Libyan people as to whether they are able to govern themselves by themselves or will fail to do so. I hope you will present a beautiful positive picture to the other peoples who are looking upon the Libyan people as they are carrying out this unique experiment. [applause]

The administration of the universities in Tripoli and Benghazi which must be taken over by the student masses, university students — the responsibility of managing and seizing this administration must not be taken lightly. This administration has revolutionary people, honorable teachers, rotten bureaucracy and workers who have not yet been able to participate in the government. This administration existed firstly and lastly for the service of the university students and it should, therefore, serve the university students. Taking over this administration entails serious responsibility.

The unversity administration must be taken over so as to be transformed into a revolutionary and successful one. Otherwise, the takeover will lose its meaning. A call for the administration to become a popular and revolutionary one and not an irresponsible one motivated by enthusiasm which dies out at the end of the event and which forgets its duties and grave responsibilities.

The government printing presses and facilities must be taken over by the writers, artists, men of letters and revolutionary thinkers. These are basic and important means. These sectors must succeed by managing them in a revolutionary manner. Their production must increase and they must serve the cause of the cultural revolution. Otherwise, the takeover will lose its meaning.

The agricultural directorates and inspectorates must be taken over by the peasants. These directorates and utilities perform a major important role in the agricultural revolution. They must be taken over by the peasants so that they will serve the agricultural revolution and propel it forward. Otherwise, their takeover by the peasants will have no meaning.

I would like to warn those who might infiltrate the ranks of the masses although they do not belong to them. The exploitation of the masses' takeover and control of these key utilities — any violation of ethics — is not allowed. No violation of responsibility is allowed. No violation of national loyalty is allowed. Therefore, the death penalty shall be applied against anyone who exploits the popular revolution and [word indistinct]. [applause] The masses which were called upon today to take over the utilities are responsible for controlling the steps of the masses while they are taking over power and for order and discipline in taking over these utilities. They are also responsible for exposing any irresponsible, sick-minded and phony person who tries to distort the action of the masses or to harm the good masses. [applause]

Accordingly, the authority which is now being handed to the people is a sacred trust vested in every member of the free Libyan people. [applause] Everyone must be true in his

heart to this trust and must comprehend its seriousness and consequences in this world and in the hereafter.

We want this people to prove that they have a high degree of ethics and a righteous religion controlling their steps and behavior and giving them a sense of responsibility. We want to prove to the world that people who have religion have ethics, ethical standards and a sense of responsibility. We want to prove that when people become free they become reasonable and capable of conducting themselves with a collective organized mentality. The insensible collective mentality thus disappears and the demagogery or anarchism or frivolity also disappear. When a people becomes free, they want to prove to the world that they are the living conscience and the real will of any country. They want to prove that the will of the people is derived from the will of God. They want to prove to the world that when they assume authority there is nothing for them to fear and nothing to fear from them.

In this great magnificent march by the Libyan people after the 1 September revolution, we do not want any stopping halfway and or any compromise solutions. The masses will raise the true leaders above their heads and will crush the false leaders under their feet. [applause and cheers] Accordingly, all the administrative and other leaderships in the Libyan Arab Republic, where there is a popular march every day to seize authority, are now put to the real test. If they are true revolutionary leaders, they have nothing to fear from the masses.

The masses will lift them above their heads. If they betray the masses and obstruct the revolutionary transformation, then they must fear the masses and will fall under the feet of the masses. [applause]

On this great day, which is a day of freedom, we want to remind ourselves that freedom is taken and not given and that the price of freedom is high. It may be more difficult to exercise freedom than to gain it, as Gandhi once said. The Libyan people must realize that freedom may not last if it is abused. If it is not used for achieving something good for the people, freedom remains a word without meaning. Freedom is what is turned into something useful in the life of man. Otherwise, what is the value of freedom? I tell you that there are enemies lying in wait for your freedom. You must always be ready to sacrifice for freedom. Indeed, we neither have big fleets nor atomic bombs, but we have a faith which drives us to martyrdom for the sake of freedom. [applause]

I would like to remind you once again that the freedom you are celebrating today is still incomplete; there are still Arab lands under occupation and an Arab people expelled from their country. Therefore, do not deceive yourselves by the celebration of the Evacuation Day, the revolution day and the freedom anniversary. Do not deceive yourselves by these unless, in the midst of the freedom anniversary celebration and jubilation, you are resolved and are continuing along the path of complete Arab freedom, which cannot become complete except through Arab unity, because Arab fate is one, Arab freedom is one and Arab territory is one. [applause and shouts of "Nasir"]

You have brothers in Palestine living under occupation and others living outside their land. You also have brothers in Egypt who have a piece of territory that is occupied and who are threatened by the enemy. You also have brothers in Syria who are living under occupation and other brothers, also in Syria, whose homes and lives are threatened by the enemy. You have brothers in Jordan whose land is occupied

and whose homes are threatened by the enemy. Therefore, our freedom is still incomplete as long as Arab independence is incomplete. Our dignity is wounded as long as Arab dignity is wounded. [applause] Therefore, it is inevitable [Al-Qadhdhafi pauses 1 minute because of commotion] Therefore, it is inevitable that we must continue on the road of Arab unity. There must be resolve to build a modern armed forces. We must resolve that everyone of us should be trained in the use of arms. [applause] Building the armed forces, training everyone in the use of arms and giving him arms, continuing on the road of Arab unity and creating Arab unity entail efforts and sacrifices and require faith. We must have faith in order to achieve these aims and to continue along the path of freedom, socialism and unity. Our slogan should always be: God is great and dignity for the Arabs. [applause] Peace be upon you.

APPENDIX I

UNITED STATES OF AMERICA
DEPARTMENT OF STATE

To all to whom these presents shall come, Greeting:

I Certify That Gerald A. Rosen, whose name is subscribed to the document hereunto annexed, was at the time of subscribing the same Acting Assistant Legal Adviser for Economic and Business Affairs, Department of State, United States of America, and that full faith and credit are due to his acts as such.

In testimony whereof, I, Henry A. Kissinger, Secretary of State, have hereunto caused the seal of the Department of State to be affixed and my name subscribed by the Acting Authentication Officer of the said Department, at the city of Washington, in the District of Columbia, this nineteenth day of October, 1976.

Seal of Department of State United States of America

HENRY A. KISSINGER
Secretary of State.

By HILDA S. O'CONNELL
Acting Authenticating Officer, Department of State.

This certificate is not valid if it is removed or altered in any way whatsoever

DEPARTMENT OF STATE
Washington, D.C. 20520

October 18, 1976

To Whom It May Concern:

I, Gerald A. Rosen, Acting Assistant Legal Adviser for Economic and Business Affairs of the Department of State of the United States of America, do hereby certify that the annexed copy of the United States of America's Note Verbale No. 59 dated July 5, 1973 and the attached certification by W. H. Holm is a true and faithful copy of the original document held in files under my custody at the Department of State, the same having been examined by me and compared with the said originals and found to agree therewith word for word and figure for figure.

Gerald A. Rosen
Acting Assistant Legal Adviser
for Economic and Business
Affairs
Department of State
United States of America

The Embassy of The United States of America presents its compliments to the Ministry of Foreign Affairs of the Libyan Arab Republic and has the honor to refer to the Embassy's Note, Number 51 of June 14, 1973, concerning the nationalization of the rights and property in Libya of the Nelson Bunker Hunt Oil Company, an American company.

The United States Government has now had the opportunity to review the public statement by the Chairman of the Revolutionary Command Council on June 11, 1973, and the official commentary accompanying Law No. 42 of the same date. It is clear from those pronouncements that the reasons for the action of the Libyan Arab Republic Government against the rights and property of the Nelson Bunker Hunt Oil Company were political reprisal against the United States Government and coercion against the economic interests of certain other U.S. Nationals in Libya. Under established principles of international law, measures taken against the rights and property of foreign nationals which are arbitrary, discriminatory, or based on considerations of political reprisal and economic coercion are invalid and not entitled to recognition by other states.

LIBYAN ARAB REPUBLIC
CITY OF TRIPOLI
EMBASSY OF THE UNITED STATES OF AMERICA } SS:

I, William H. Holm, Consul of the United States of America at Tripoli, Libya, duly commissioned and qualified do hereby certify that the annexed copy of the Embassy of The United States of America's Note Verbale No. 59 dated July 5, 1973 is a true and faithful copy of the original, the same having been carefully examined by me and compared with the said original and found to agree therewith word for word and figure for figure.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the Embassy of the United States of America at Tripoli, Libya, this 5th day of August, 1973.

W. H. Holm
Consul of the United States
of America

APPENDIX J

UNITED STATES OF AMERICA
DEPARTMENT OF STATE

To all to whom these presents shall come, Greeting:

I Certify That Gerald A. Rosen, whose name is subscribed to the document hereunto annexed, was at the time of subscribing the same Acting Assistant Legal Adviser for Economic and Business Affairs, Department of State, United States of America, and that full faith and credit are due to his acts as such.

In testimony whereof, I, Henry A. Kissinger, Secretary of State, have hereunto caused the seal of the Department of State to be affixed and my name subscribed by the Acting Authentication Officer of the said Department, at the city of Washington, in the District of Columbia, this nineteenth day of October, 1976.

Seal of
Department
of State
United States
of America

HENRY A. KISSINGER
Secretary of State.

By HILDA S. O'CONNELL
Acting Authenticating Officer,
Department of State.

This certificate is not valid if it is removed
or altered in any way whatsoever

DEPARTMENT OF STATE
Washington, D.C. 20520

October 18, 1976

To Whom It May Concern:

I, Gerald A. Rosen, Acting Assistant Legal Adviser for Economic and Business Affairs of the Department of State of the United States of America, do hereby certify that the annexed copy of the letter of August 3, 1973, from William J. Casey to G. Henry M. Schuler of Nelson Bunker Hunt, is a true and faithful copy of the original document held in files under my custody at the Department of State, the same having been examined by me and compared with the said originals and found to agree therewith word for word and figure for figure.

Gerald A. Rosen
Acting Assistant Legal Adviser
for Economic and Business
Affairs
Department of State
United States of America

August 3, 1973

G. Henry M. Schuler
Nelson Bunker Hunt
1401 Elm Street
Dallas, Texas 75202

Dear Mr. Schuler:

I am writing in response to your letter of August 2, 1973 regarding the nationalization on June 11, 1973 of Nelson Bunker Hunt's rights and property in Libya. In your letter, you requested me to approve the release of the text of a diplomatic note transmitted by the U.S. Government to the Government of the Libyan Arab Republic on July 8, 1973, which contained our position with respect to the June 11 nationalization and, further, that this Government make representations to certain governments which are understood to be involved in purchasing oil from Nelson Bunker Hunt's nationalized concession in Libya.

We have requested our Embassy in Tripoli to forward to us as soon as possible certified copies of the note mentioned above in both English and Arabic. In the interim, I am enclosing the text of the substance of the note and will provide you with certified copies of the complete texts as soon as they are available. We have no objection to your using this note in connection with any pending or proposed litigation or in any other way appropriate to the assertion of your legal rights to the nationalized property.

The Department is also prepared to give sympathetic consideration to appropriate diplomatic representation to

any government concerned where there is evidence that the government or any agency under its control has purchased or intends to purchase or otherwise handle oil from the nationalized Sarir field.

Sincerely,

William J. Casey

Enclosure

APPENDIX K

UNITED STATES OF AMERICA
DEPARTMENT OF STATE

To all to whom these presents shall come, Greeting:

I Certify That Gerald A. Rosen, whose name is subscribed to the document hereunto annexed, was at the time of subscribing the same Acting Assistant Legal Adviser for Economic and Business Affairs, Department of State, United States of America, and that full faith and credit are due to his acts as such.

In testimony whereof, I, Henry A. Kissinger, Secretary of State, have hereunto caused the seal of the Department of State to be affixed and my name subscribed by the Acting Authentication Officer of the said Department, at the city of Washington, in the District of Columbia, this nineteenth day of October, 1976.

Seal of Department of State United States of America

HENRY A. KISSINGER
Secretary of State.

By HILDA S. O'CONNELL
Acting Authenticating Officer, Department of State.

This certificate is not valid if it is removed or altered in any way whatsoever

DEPARTMENT OF STATE

Washington, D.C. 20520

October 18, 1976

To Whom It May Concern:

I, Gerald A. Rosen, Acting Assistant Legal Adviser for Economic and Business Affairs of the Department of State of the United States of America, do hereby certify that the annexed copy of the *Statement by the Department of State on Policy on "Hot" Libyan Oil*, is a true and faithful copy of the original document held in files under my custody at the Department of State, the same having been examined by me and compared with the said originals and found to agree therewith word for word and figure for figure.

Gerald A. Rosen
Acting Assistant Legal Adviser
for Economic and Business
Affairs
Department of State
United States of America

Statement by the Department of State on Policy on "Hot" Libyan Oil

Question has been raised in testimony before the Subcommittee on Multinational Corporations of the Senate Committee on Foreign Relations about the policy of the Department of State in respect of "hot" Libyan oil. The statement that follows describes that policy.

The Sabbatino Case and the "Sabbatino Amendment"

The policy of the State Department in respect of international trade in "hot" products must be considered in the context of enactments of the United States Congress. In particular, it should be recalled that, following a decision by the U.S. Supreme Court in the case of *Banco Nacional de Cuba v. Sabbatino, Receiver, et al.*,* the Congress, on October 7, 1964, enacted, as Section 620(e)(2) of the Foreign Assistance Act of 1961, as amended, what is known as the "Sabbatino" or "Hickenlooper" Amendment. That Amendment reversed the presumption that U.S. courts had previously applied in cases involving "acts of State." It has been authoritatively stated that the act-of-State doctrine means that "the courts of one country will not sit in judgment on the acts of the government of another done within its own territory . . ."** The Senate Report on the Foreign Assistance Act of 1964 provides the following succinct statement of the situation before the Sabbatino Amendment and the change in U.S. law which the Amendment was intended to bring about:

> "The act-of-state doctrine has been applied by U.S. courts to determine that the actions of the foreign

* 193 F. Supp. 375 (S.D.N.Y. 1961); aff'd 307, F.2d 845 (2d Cir. 1962); reversed and remanded, 376 U.S. 398 (1964).

** *Underhill v. Hernandez*, 168 U.S. 250 (1897).

sovereign cannot be challenged in private litigation. The Supreme Court extended this doctrine in the *Sabbatino* decision so as to preclude U.S. courts from inquiring into the acts of foreign states, even though these acts had been denounced by the State Department as contrary to international law.

• • •

"The effect of the amendment is to achieve a reversal of presumptions. Under the *Sabbatino* decision, the courts would presume that any adjudication as to the lawfulness under international law of the act of a foreign state would embarrass the conduct of foreign policy unless the President says it would not. Under the amendment, the Court would presume that it may proceed with an adjudication on the merits unless the President states officially that such an adjudication in the particular case would embarrass the conduct of foreign policy.*"

The purpose of the Sabbatino Amendment, which is the law today, is precisely to permit American courts to entertain suits such as those that have been brought in pursuit of "hot" oil. The commodity in point in 1964 was "hot" sugar; later there have been legal actions brought in pursuit of "hot" copper; most recently, there have been cases brought in pursuit of "hot" oil. More broadly, the intent of the Congress in nationalization cases is, as the Sabbatino Amendment makes clear, that, first, foreign governments should be discouraged from nationalizing property of U.S. citizens in a manner contrary to international law, and second, the law of the offending country should not operate as a shield when the courts of the United States are called upon to consider the consequences of unlawful nationalizations, such as attempts to sell property which is the object of such acts — except when the President determines that U.S. foreign policy interests require otherwise. These two aspects of the intent of Congress in nationalization case are reflected in Section 620(c) of the Foreign Assistance Act. The actions of the Department of State in the cases of the Libyan expropriations were formulated and carried out in the light of and in accordance with the policy enunciated by Congress in the Sabbatino Amendment.

* S. Rep. No. 1188, 88th Cong., 2d Sess., pt. I, at 24 (1964).

The theory of a suit brought in pursuance of hot oil or another hot commodity is simple. The company whose property has been seized in violation of international law maintains that the expropriating government did not, by virtue of an act that violates international law, acquire good title to the property in question. The company places prospective purchasers on notice of this contention. If nevertheless a party proceeds to purchase a hot product, the expropriated company initiates a legal action designed to regain possession of the property unlawfully taken from it, or the proceeds.

Courts of various countries have reached varying decisions in cases brought in pursuance of "hot" commodities. Perhaps the most notable of such cases before *Sabbatino* was that of the *Rosemary*. The Anglo-Iranian Oil Company brought suit in 1951 to recover a cargo of oil sold by the Mossadegh Government. The Aden Court found that the expropriation of Anglo-Iranian's property had not been compensated, that expropriation without compensation is contrary to international law, that international law was incorporated into the domestic law of Aden, and that, therefore, the Court could not recognize title of the Iranian Government to the oil taken in violation of international law, nor title in the purchaser of the oil. While Anglo-Iranian won the case in Aden, which was then a British protectorate, it lost similar suits in Japan and Italy.

The proceeds of sugar exported from Cuba which were at issue in the Sabbatino litigation ultimately went not to the Castro Government but to the expropriated American party-in-interest. Litigation over Chilean copper and Libyan oil has not yet been definitively resolved.

The Libyan Nationalizations

The Libyan nationalizations which have given rise to controversy over "hot" oil began with Libya's expropriation of British Petroleum's interest in Concession Number 65 — the Sarir field — which BP held with a co-concessionnaire, Nelson Bunker Hunt, an American national. The Libyan Government expropriated BP in retaliation for the occupation by Iran of three islands in the Persian Gulf after the British Government had brought to an end its protection of the Persian Gulf emirates.

In response, the British Government delivered a note to the Libyan Government stating that the Libyan Government's actions with respect to British Petroleum "amount to a breach of international law and are invalid." The note stated that

> "Nationalization measures which are arbitrary or discriminatory or which are motivated by considerations of a political nature unrelated to the internal well being of the taking State are, by a reference to those principles [of international law], illegal and invalid."

The Nelson Bunker Hunt Nationalization

Following its nationalization of BP, the Libyan Government asked the Nelson Bunker Hunt Company, as co-concessionnaire, to carry on operation of the concession. Nevertheless, difficulties soon developed. On June 11, 1973, the Libyan Government expropriated Hunt's rights under Concession

Agreement 65. The decree then issued by the Libyan Government essentially provides for takeover of all of Hunt's rights by Libya; enjoins employees to remain at their posts; and provides that a board shall be set up to determine compensation.

June 11 was the third anniversary of the closing of the U.S. Air Force Base at Wheelus, and it was marked by a celebration in Tripoli featuring speeches by, among others, President Sadat of Egypt, President Amin of Uganda, and Colonel Qadhafi. Colonel Qadhafi took the occasion to announce publicly the decision to nationalize Hunt's assets. This announcement came in the context of an attack on the United States and its policies in the Middle East.

In part Colonel Qadhafi said:

> "The United States, which believes it dominates the world with its oil monopolies, its aggressive military bases and fleets, and which continues to provoke the peoples fighting for their freedom and independence — we proclaim loudly that this United States needs to be given a big, hard blow in the Arab area on its cold, insolent face . . .
>
> "The time has come for the Arab peoples to confront the United States, the time has come for the U.S. interests to be threatened earnestly and seriously in the Arab area, regardless of the cost . . . U.S. arrogance is now, moreover, manifested in the attitude of the oil companies, which do not wish to respond and submit to the will of the people in whom sovereignty is vested — the people, the owners of the wealth, the owners of the oil who enjoy sovereign rights over the oil wealth and have the final and last say. In our negotiations with the American monopoly companies, we are facing U.S. arrogance and the imperialistic spirit which does not heed either right or logic. However, the time may come — if it has not already come — for the serious and

dangerous confrontation to take place, a confrontation the cost of which we must be prepared to bear, with the oil companies and the whole of U.S. imperialism. . . ."

The official Radio Tripoli took only a slightly less strident line in announcing the nationalization decree.

On July 8, 1973, after there had been opportunity for detailed consideration of the reasons stated by the Libyan Government for the nationalization, the United States sent a note regarding the Hunt nationalization to the Libyan Government which stated that:

> ". . . the reasons for the action of the [Libyan Government] against the rights and property of the Nelson Bunker Hunt Oil Company were political reprisal against the United States Government and coercion against the economic interests of certain other U.S. nationals in Libya. Under established principles of international law, measures taken against the rights and property of foreign nationals which are arbitrary, discriminatory, or based on considerations of political reprisal and economic coercion are invalid and not entitled to recognition by other states.
>
> "In these circumstances, the Government of the United States must protest the action in violation of international law against the Nelson Bunker Hunt Oil Company, and it calls upon [Libyan Government] to take the necessary steps to rectify this situation and to discharge its obligations under international law with respect to the Nelson Bunker Hunt Oil Company."

Early in July, prior to the delivery of the U.S. diplomatic note on July 8, the Nelson Bunker Hunt Company had published in a number of U.S. and foreign newspapers a notice stating, among other things, Hunt's view of the Libyan nationalization as a violation of international law

and of the Libyan Government's contractual obligations. The announcement stated that:

> "The attention of all of those who may be concerned with these developments, whether as purchasers or sellers of oil, oil products or otherwise, is drawn to the continuance of Hunt's rights. It is Hunt's intention to assert those rights wherever and whenever necessary against those who infringe them including anyone dealing in or with oil extracted from the Sarir Field, its products or proceeds. This warning applies equally to dealings in or with so-called 'royalty oil' or 'cost crude oil', of which there is none. Legal title to all oil from Sarir Field and Concession 65 rests in B.P. Exploration Company (Libya) Ltd. and Nelson Bunker Hunt."

Bunker Hunt brought suits in various jurisdictions abroad and in the U.S. in an effort to recover Sarir crude from its nationalized Concession No. 65, or its proceeds. Hunt, together with BP, filed suit in the Guanabaro State Court in Brazil on July 17, 1973, in respect of the purchase of Sarir oil by Petrobras, the Brazilian national oil company. The Government of Brazil intervened in this suit, which has been removed to the Brazilian federal courts — a decision which it is understood that Hunt and BP are appealing.

Hunt also joined BP in similar suits in Italy, where some twenty separate legal actions are now pending, and in Greece, where several suits are pending in trial court. Hunt and BP also brought actions in state courts Houston, Texas and Philadelphia, Pennsylvania, against the Coastal States Gas Corporation in respect of oil allegedly extracted from Sarir and purchased from the Libyan Government. Those suits are still in litigation.

Following Bunker Hunt's nationalization, representatives of the Company requested the Department to support its

litigation in respect of oil believed to originate in the expropriated concession. This support, it was suggested, could take the form of representations to foreign governments whose instrumentalities were thought to be receiving shipments of Sarir oil, and possible intervention in suits in U.S. courts.

It was the conclusion of the Department of State, in light of the illegal nature of the nationalization of Hunt and the implications which that action had for the interests of other U.S. nationals in Libya, and elsewhere, that the U.S. Government could and should take certain steps to support the Hunt Company's position. Hunt, and its concession partner, BP, should, it was thought, pursue their legal remedies wherever possible since a failure to do so would encourage the Libyan Government to continue its policy of expropriating foreign oil companies in violation of international law. Having determined that the nationalization on June 11 was invalid under international law, it was believed that it was important for the U.S. Government to assert that position on behalf of the Hunt Company, a U.S. national, in an attempt to make it as difficult as possible for the Libyan Government to profit by its unlawful acts. The leverage that Hunt, and the U.S. Government, could bring to bear on Libya was limited; an important element of it was legal action in pursuit of "hot" oil.

The U.S. Government accordingly made its position on the question of "hot" oil clear to a number of governments whose instrumentalities or nationals were known or understood to be purchasing nationalized Sarir oil. Moreover, in response to Hunt's request for support in pursuing its legal rights with respect to the expropriated Sarir oil, the Department of State, on August 3, 1973, provided the Company with the text of the substance of its diplomatic note

to Libya. The Department's letter transmitting this document said that it would give the company a certified copy of the note when it was available and stated further that:

> "We have no objection to your using this note in connection with any pending or proposed litigation or in any other way appropriate to the assertion of your legal rights to the nationalized property."

The letter also stated the following with respect to diplomatic representations by the State Department to other governments on this subject.

> "The Department is also prepared to give sympathetic consideration to appropriate diplomatic representations to any government concerned where there is evidence that the government or any agency under its control has purchased or intends to purchase or otherwise handle oil from the nationalized Sarir field."

The contents of the Department's letter to the Hunt Company, and thus the substance of its note of July 8 to the Libyan Government, quickly became public. *The New York Times*, for example, on August 12, 1973, carried the following analysis of the U.S. action:

> "Libya doubtless will reject the American complaint The purpose of the State Department note, however, was not to engage in legal debate with Colonel Qadhafi but to inform other governments that the United States regarded the Libyan seizure as illegal. Hence, any oil exported from Bunker Hunt's former fields would be regarded by the United States as stolen, and Bunker Hunt plans to bring lawsuits wherever it can to prevent the importation of oil from its former wells.
>
> "Whether this will prevent Libya from selling the Bunker Hunt oil, a high-quality fuel, under present conditions of strong international demand is debatable, but the American note has a second purpose. It is hoped

that the American reaction will deter Libya and other Arab countries from going further along the nationalization road. In countries like Saudi Arabia, which have never been enthusiastic about nationalization, Arab leaders may ask themselves whether seizure — no matter what the appeals from Colonel Qadhafi — is now more trouble than it is worth."

Further Libyan Nationalizations

However, Libya did not stop with the Bunker Hunt nationalization. On August 11, 1973, Libya nationalized 51% of Occidental Petroleum's interests in that country. Occidental acquiesced in this nationalization, having reached an agreement with the Libyan Government on compensation. The American partners in the Oasis group, that is, Marathon, Continental Oil and Amerada Hess, agreed on August 16 to Libyan demands for 51% control of those companies' interest in Libya, effective August 11. The fourth shareholder in Oasis, Shell, did not.

On September 1, 1973, the Libyan Government issued a decree purporting to nationalize 51% of the interests of other foreign oil companies in Libya. The American companies affected by this decree were Exxon, Mobil, Texaco, Standard Oil Company of California, Libyan American (Atlantic Richfield) and Grace. Included in the nationalization decree were terms by which the Libyan Government purported to:

(1) Acquire rights to 51% of all the production of hydro-carbons from each of the companies' concessions;

(2) Establish a three-member committee to manage each company by majority rule with two members of the committee, including the chairman, appointed by the Government;

(3) Require that all employees of the companies regardless of nationality continue their duties;

(4) Stipulate punishment by fine or imprisonment of anyone violating the terms of the decree; and

(5) Establish a committee to be selected solely by the Government to set the level of compensation.

On September 14, 1973, the U.S. Embassy delivered a note to the Libyan Government concerning the September 1 decree. It expressed U.S. concern at the absence of any indication in the decree that Libya intended to provide prompt, adequate, and effective compensation for the foreign investments affected, as required by international law. The note pointed out that the "net book value" formula for compensation which had been publicly described by the Libyan Prime Minister after the decree was isued was far less than the fair value of the contract rights and properties involved. Accordingly, the prospective compensation did not meet the minimum requirements of international law for compensation. The note further stated that the U.S. Government expected the Government of Libya to respond positively to the requests of the companies for arbitration of their disputes, as provided in their concession contracts. It held that failure to so respond would constitute a "denial of justice" and a distinct breach of international law.

The note concluded by stating:

"In view of the Government of the United States, the expropriation of 51% of the interests of these American companies operating in Libya without resort to arbitration and without the offer of adequate compensation would be inconsistent with . . . assurances [made in 1969 by a spokesman of the then-new Revolutionary Command Council to the effect that the new Libyan regime would fulfill all of its international obligations and would respect the rights of oil companies operating in Libya], inconsistent with the terms of the concession contracts, and invalid under international law."

On February 11, 1974 Libya proceeded to expropriate the remaining 49% interests of three of the companies concerned, Standard Oil Company of California, Texaco and Atlantic Richfield. Subsequently, Exxon and Mobil reached agreement with the Libyan Government on the basis of the September 1 decree. Texaco and the Standard Oil Company of California have not accepted that decree and, since the Libyan Government has refused to join in the arbitral processes provided for in its concession contracts with Texaco and Socal, have requested the President of the International Court of Justice to appoint Sole Arbitrators.

State Department Contacts with U.S. Companies Regarding "Hot" Oil

On September 5, 1973, Under Secretary of State Casey and a number of his colleagues met with representatives of the American oil companies, 51% of whose Libyan assets had been taken, who were resisting the Libyan decrees. The companies requested that the United States Government lend its support, diplomatic and legal, to this end.

The September 1, 1973, nationalization decree raised anew the prospect that the Libyan Government would try to sell oil from the expropriated concession areas in the United States. This, in fact, happened. By mid-September, reports began to reach the Department, from the companies whose assets had been affected by the September decree, that other U.S. firms were about to lift, or were in the process of lifting, "hot" oil from Libyan ports.

Officials of Exxon and Texaco thus telephoned Frank Mau of the Department's Office of Fuels and Energy, on September 13, 1973, informing him that the Commonwealth Refining Company and the New England Petroleum Company (NEPCO) were reportedly contracting to lift oil claimed by

them. Exxon indicated that it intended to inform Commonwealth of the legal consequences of lifting such oil. It was indicated that Standard Oil of California (SOCAL), Texaco's partner in Libya, would similarly inform NEPCO, with which SOCAL had a business relationship. Mr. Mau stated that the Department would call Commonwealth Refining and NEPCO to be certain that both companies were aware of the possible legal risks in lifting contested Libyan crude at that time. Mr. Mau then called W. F. Schulte, Executive Vice President of Commonwealth Refining Company, and R. G. Weinand, Executive Vice President of the New England Petroleum Corporation, concerning reports that their companies planned to lift Libyan crude to which oil companies operating in Libya might have a legal claim. Mr. Mau stated the view of the United States Government that the Libyan nationalization decree of September 1 did not meet standards recognized under international law and suggested that the companies reconsider the question of buying Libyan crude oil at that time. Mr. Mau also expressed the Government's desire that arbitration or negotiation of current disputes in Libya be successful and that no actions should be taken by third parties which might prevent this. In his report of this conversation, Mr. Mau noted that both officials expressed understanding and a desire to cooperate with the Government in this matter.

Later that day, Richard D. Manning, an attorney representing NEPCO telephoned, and, at Mr. Mau's request, Stephen M. Schwebel, the State Department's Counselor on International Law, returned the call. Mr. Manning wished to discuss what he understood from Mr. Weinand to have been the substance of Mr. Mau's call. Mr. Manning strongly disagreed with the position he understood Mr. Mau had taken and set out at length NEPCO's position

as a very major supplier of petroleum to consumers in the New York area. He said that he had advised his client, NEPCO, to continue to buy Libyan oil to meet its contractual obligations. He claimed that the alternative was a blackout of New York City. As Mr. Schwebel reported this conversation, he expressed the following views to Mr. Manning:

> "I noted that Mr. Mau's call reflected the fact that, in the view of the State Department, the expropriation of 51% of the interests of certain American oil companies in Libya was incontestably in contravention of Libya's contractual undertakings, and, since Libya offered inadequate compensation and so far was not implementing its arbitral obligations, Libya was acting in violation of international law. Accordingly, the taking is, in our view, invalid; Libya thus could not pass good title to the oil in question. If a court action were to be brought and if the State Department were asked for its views, I believe that we would so state."

Mr. Schwebel further reported the following reaction of Mr. Manning:

> "Mr. Manning said that, if the United States Government 'formally' would inform New England Petroleum that import of Libyan oil 'is not in the national interest', New England Petroleum would cease importing it. Failing such a formal notification, he would advise his client to maintain its imports. If the U.S. 'formally' advised that New England Petroleum had a 'legal obligation' not to import legal oil, it would not. As it was, it would import that oil."

In a letter to Secretary of State Kissinger dated September 15, 1973 (at a time when Mr. Kissinger had not actually taken office as Secretary of State), Mr. Manning, writing as counsel for NEPCO and for the Grand Bahamas Petroleum Company, a NEPCO subsidiary and a partner with a Socal

subsidiary in a Bahamian oil refinery, summarized his understanding of Mr. Mau's conversation on September 13 with Mr. Weinand of NEPCO. Mr. Manning also reiterated the points which he had made to Mr. Schwebel on September 13. In closing Mr. Manning made the following statements:

> "We wish to emphasize that NEPCO and Petco [Grand Bahamas Petroleum Co.] are buyers of crude oil and sellers of refined products; they do not wish to become engaged in any dispute between the major oil companies and the Government of any producing country, as to which of them owns the oil purchased in good faith to supply utility customers so that the public interest can be served.
>
> "Indeed, it would appear that Socal, which is so highly concerned about the asserted failure of the Libyan Government to conform to its contract with Socal, is not similarly concerned with what appears on its face to be a breach of its contract with Petco. Sanctity of contract, if it is to be observed, as indeed it should, should be applied equally to all, not just to those major oil companies wishing to apply it.
>
> "Where the interests of the public are so vital, and so clearly at stake, the sanctity of the Petco-Socal contract would appear to be paramount. We hope that your office will be able to appreciate this and act accordingly."

On September 17, an Exxon official informed Mr. Mau and Mr. Schwebel that Commonwealth would not purchase "hot" oil; it had been informed initially that the oil it was to receive from Libya was royalty oil. Mr. Schwebel took the occasion of this conversation to inquire as to whether Exxon had considered sharing its Libyan oil with Socal so that the latter could meet the urgent demands of its customers. Mr. Pramuk, the Exxon official, replied that, as far as he knew,

no thought had been given to that question, since it had just arisen, but that he would raise it with his colleagues.

Conversations on "hot" oil between Department officials and industry representatives continued during the autumn and winter. There was further occasion to set out the Department's views on the illegality of the Libyan nationalization decrees with another representative of what may have been a "hot" oil importer, in which that representative indicated to Mr. Schwebel that "hot" oil was selling at a slight discount. While noting the Department's current views on the law of the matter, Mr. Schwebel stated that the stand it would take, if called upon, in any court action, would be addressed in the light of the facts that would then obtain.

In view of the short supply situation that was beginning to threaten in the United States last autumn (even before imposition of the Arab oil embargo), and the extra-ordinary dependence which had been developed by NEPCO upon Libyan oil as the sole source for supplying a large market in the New York area, despite the obvious instability of conditions in Libya, representatives of the State Department naturally also emphasized to the companies affected by the September 1 nationalization decree, particularly Socal and Texaco, the need to deal effectively with the problem of supplying their customers. These companies assured the Department that they were actively canvassing various possibilities for meeting their customers' needs — including those of NEPCO. For example, George Bennsky, a colleague of Mr. Mau, and Mr. Schwebel on more than one occasion suggested to Socal that it consider resuming lifting of Libyan oil, while reserving its position on the merits of the dispute with Libya. Eventually Socal did resume lifting of oil from Libya, and, it is understood, then offered oil to NEPCO. The companies holding Libyan concessions also took the posi-

tion that "hot" Libyan oil imported into the United States actually could be delivered to the ultimate consumer, even if it were the subject of a lawsuit, since a bond could be posted to cover the sale proceeds while litigation as to the right to the oil continued. (It is understood that this is what happened last summer in Bunker Hunt's suit against the Coastal States Gas Corporation brought in Philadelphia. Coastal States posted a bond of $1,250,000 while the actual cargo of oil made its way into the distribution system.)

On October 5, 1973, the Chairman of the New York State Public Service Commission, Joseph Swidler, who was deeply concerned over utilities in New York State receiving fuel from their suppliers, called Mr. Schwebel. Mr. Swidler noted his regret that New York utilities had become so dependent upon NEPCO, but asked that all that could be done be done to help New York out of the situation that threatened. Mr. Schwebel explained the Department's views on the "hot" oil problem to him, and noted that Socal had been urged by the State Department to resume lifting of its uncontested 49% share of Libyan oil and that it was giving sympathetic consideration to the suggestion. Mr. Swidler was reassured to hear that.

As noted, during the course of discussions between Department officials and parties concerned with the import of Libyan oil, the question arose as to what the views of the State Department would be with respect to invoking the act-of-State doctrine to bar suits in pursuit of "hot" oil. This point brings this statement full circle. As noted, the State Department is of the view that the Libyan nationalization decrees of June 11, 1973, and September 1, 1973, are violative of international law. The June decree was discriminatory, arbitrary and not for a public purpose; the September decree made an offer of inadequate compensation and also

failed to respect the obligation to arbitrate disputes with concession holders. In these circumstances, and having regard to the foreign policies pursued by the Libyan Government and the state of relations between the Libyan and United States Governments, it was and remains highly unlikely that the Executive Branch would find it appropriate to request courts in the United States to refrain from passing upon acts of the Libyan Government on grounds of "act of State". It was believed that it was appropriate so to indicate to those who inquired, who were not limited to Mr. Manning. And, in circumstances in which the United States had drawn the attention of a number of foreign governments to the difficulties involved in the purchase of oil alleged to be "hot", it was thought no less appropriate similarly to inform American companies concerned.

The foregoing line of policy was not lightly decided upon, nor was it pursued as a result of decisions of middle level officials. William J. Casey, then Under Secretary of State, senior officials of other Departments, the National Security Council staff, and White House energy advisers were kept fully and closely informed. The policy was considered and reviewed by the staff of the National Security Council, in meetings in which senior officials of the Government took part.

Conclusion

The principal points of this statement may be summarized by quoting a statement that the State Department issued in response to stories in the press on the question of "hot" oil policy, which, among other inaccurate claims, indicated that the State Department acted on the particular behalf of the major oil companies:

> "*The Wall Street Journal* of February 15th carries a front page story which claims that the Department of State acted on behalf of big oil to discourage small American oil companies from importing hot Libyan oil to the United States. It further claims that, as a result of the actions of the State Department, the American consumer is paying more for energy. Related stories appear in *The New York Times* and *The Washington Post* of February 19th.

"The facts are as follows:

"1. The Department of State does not act on the particular behalf of the major oil companies. As appropriate, it acts on behalf of all American companies large and small. For example, its first and strongest protest to date against pertinent actions of the Libyan Government has not been on behalf of a major oil company but on behalf of Nelson Bunker Hunt, an independent oil company.

"2. The State Department traditionally has sought to assure that American property interests abroad shall not be subjected to expropriation in violation of international law. It does so because of the importance it attaches to the integrity of international law and the important contribution made by American investment abroad to the well being of the American economy — including that of the American consumer. The foreign ministries of other governments likewise seek to promote the just and lawful treatment both of the persons and property of their nationals.

"3. American companies whose overseas assets have been seized in violation of international law — whether oil, copper or other assets — have sometimes decided legally to pursue possession of those assets when they are exported to third countries. It is for the courts in various jurisdictions to pass upon the merits of resultant conflicting claims. The State Department has declined to block suits in American courts in pursuit of goods claimed to be hot. Its so declining is clearly consistent with the will of the U.S. Congress as expressed

in Section 620(e)(2) of the Foreign Assistance Act of 1962. Moreover, it has informed a number of foreign governments that it hopes that their agencies and nationals will not purchase goods whose title is clouded under international law. It similarly has informed American nationals concerned — such as the New England Petroleum Company — of its view that certain Libyan seizures of American assets were in violation of international law, and that, accordingly, title to goods produced from those assets is controversial. The State Department leaves to the companies concerned the decision whether they wish to proceed with such purchases.

"4. It is inaccurate to say, as *The Wall Street Journal* does, that efforts of some American oil companies, small as well as large, to block the sale of hot Libyan oil have had next to no effect. Actually, a number of prospective purchasers have refrained from purchasing hot oil and other hot products; court actions appear to have further inhibited the flow of hot goods; the price at which hot oil sells today is markedly *lower* than that of other oil, a reflection of the fact that is harder to move; and governments that have seized foreign property unlawfully have manifested their anxiety that suits in pursuit of hot products be dropped. It is also questionable to infer, as stories in *The New York Times* and *The Washington Post* do, that the increase in the price of Libyan oil to the American consumer simply stems from efforts to pursue hot oil. Increased costs for Libyan and other foreign oil the world over have largely resulted from policies imposed by governments of oil exporting States."

This is not to say that the policy of pursuit of "hot" oil — a policy of certain companies which was of course initiated before the imposition of the Arab oil embargo and cutback and consequent shortage — has been a great success. It has not stopped unlawful expropriations, though it may have

inhibited them. It may have contributed to an increase in the costs of oil in some markets, though data in this regard is mixed, for, as noted, "hot" oil sells at a discount.

But it is to say that the measured support which the Department of State lent to the policy of pursuit of "hot" oil was understandably and sensibly given. Pursuit of "hot" oil was a weapon in an effort to deal with the unlawful expropriation of American investment in countries overseas. Pursuit of "hot" oil and other products in earlier instances of unlawful expropriation had proved a significant weapon. There were few weapons at hand; this one, which the companies were within their legal rights in invoking, promised to have a useful, if not decisive effect. When it became known to the State Department that an unusually heavy dependance upon Libyan oil had been built into the supply of public utilities in the New York area, the Department took what steps it could to try to deal with that situation.

In pursuing the foregoing approach, the Department of State has been influenced not only by the view which the Congress manifested in adopting the Sabbatino Amendment that it should take a benign attitude towards suits brought in pursuit of "hot" products. It also has been influenced by the will of the Congress, manifested in more than one piece of legislation, that the Department of State should vigorously protect American foreign investment.

APPENDIX L

Nelson Bunker HUNT, Plaintiff

v.

MOBIL OIL CORPORATION et al,
Defendants.

No. 75 Civ. 1160.

United States District Court,
S. D. New York.
Nov. 5, 1975.

On Motion for Certification
March 2, 1976.

OPINION

EDWARD WEINFELD, District Judge.

Certain defendants (Mobil Oil Corporation, Texaco, Inc., Standard Oil Company of California, The British Petroleum

Company, Ltd., Exxon Corporation, Gulf Oil Corporation, Occidental Petroleum Corporation, Grace Petroleum Corporation), excepting only defendants Shell Petroleum Company, Ltd. and Gelsenberg AG,[1] move to dismiss the first, second and third claims of the complaint, encompassing all of plaintiff's antitrust charges, for lack of subject matter jurisdiction and for failure to state claims upon which relief can be granted, pursuant to Rule 12(b) (1)[2] and (6) of the Federal Rules of Civil Procedure. The defendants also move to dismiss the fourth claim, which alleges a breach of contract, or for partial summary judgment thereon; alternatively, they seek an order pursuant to section 3 of the Federal Arbitration Act[3] staying all proceedings under the fourth claim pending arbitration thereof.

[1] The defendant Gelsenberg AG moved to dismiss the complaint for lack of in personam jurisdiction and for lack of proper service of process, which motion was denied.

[2] The precise basis for the claim of lack of subject matter jurisdiction is not altogether clearly articulated by the defendants. Upon argument of the motion, counsel for defendants stated that both branches of the instant motion would be treated the same, to wit, as "failure to state a claim." In any event, the defendants' challenge for lack of subject matter jurisdiction is without substance. As the Court of Appeals indicated recently, in *Brault v. Town of Milton*, Docket No. 74-2370 (2d Cir., Aug. 22, 1975). "[s]ince plaintiff [has] drawn [his] complaint so as to seek, recovery under the . . . laws of the United States, this court has jurisdiction to hear the case, even if the complaint ultimately fails to state a claim." In *Baker v. Carr*, 369 U.S. 186, 199, 82 S.Ct. 691, 700, 7 L.Ed.2d 663 (1962), the Supreme Court held that such a suit may be dismissed for want of jurisdiction of the subject matter only if the alleged claim under the federal statute is " 'so attenuated and unsubstantial as to be absolutely devoid of merit' . . . or 'frivolous.' . . ." The plaintiff's complaint here does not fall within this narrow exception to the rule, originating in *Bell v. Hood*, 327 U.S. 678, 682, 66 S.Ct. 773, 776, 90 L.Ed. 939 (1946), that "[j]urisdiction . . . is not defeated . . . by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover."

[3] 9 U.S.C. § 3.

At the outset a preliminary observation is in order. The defendants' motion to dismiss is based solely upon the alleged deficiencies of plaintiff's complaint, to which is attached an agreement of the parties and related amendments and supplements. The movants, however, in somewhat discursive fashion, have directed part of their argument to the merits of plaintiff's claims. This makes it necessary to state, what ordinarily is accepted as hornbook law, that the merits of the claims set forth in the complaint are not at issue; that the allegations of the complaint are assumed to be true for the purposes of this motion;[4] further, that a complaint should not be discussed unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."[5]

THE ANTITRUST CLAIMS

Plaintiff Hunt, who was engaged in oil production in Libya under a government concession, alleges three claims of violation of the antitrust laws by the defendants. In broad outline, he charges that prior to and in the course of cooperative efforts by plaintiff and defendants to deal with increasingly aggressive oil producing countries, defendants combined and conspired in violation of section 1

[4] *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 515-16, 92 S.Ct. 609, 30 L.Ed.2d 642 (1972); *Walker Process Equip., Inc. v. Food Mach. & Chem. Corp.*, 382 U.S. 172, 174-75, 86 S.Ct. 347, 15 L.Ed.2d 247 (1965).

[5] *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957), *reaff'd Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974). *See also Prudential Ins. Co. of America v. Insurance Agents' Int'l Union (AFL-CIO)*, 169 F.Supp. 534, 526 (S.D.N.Y. 1959).

of the Sherman Act[6] and section 73 of the Wilson Tariff Act:[7]

Claim 1: to impose unlawful customer and market restrictions upon him by insisting he enter into an agreement, thereafter enforced, which limited the resale of Persian Gulf oil supplied to him by defendants only to his preexisting Western Hemisphere and European customers.

Claim 2: to group boycott plaintiff by collectively refusing to deliver to him some ninety million barrels of oil rightfully due him under that agreement.

Claim 3: to use the agreement between the parties, as amended and extended, and their consequent control over the course of Libyan negotiations, to promote certain defendants' Persian Gulf interests at the expense of plaintiff and, ultimately, to destroy plaintiff by preventing him from reaching any agreement with the Libyan government, which course of action led to plaintiff's nationalization and elimination from competition as a producer of Libyan oil. Such concerted misuse of the parties' agreement was allegedly the continuance of an already existing conspiracy on the

[6] 15 U.S.C. § 1. This section reads as follows:

"Every contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."

[7] 15 U.S.C. § 8. This section reads as follows:

"Every combination, conspiracy, trust, agreement, or contract is declared to be contrary to public policy, illegal and void when the same is made by or between two or more persons or corporations, either of whom, as agent or principal, is engaged in importing any article from any foreign country into the United States, and when such combination, conspiracy, trust, agreement, or contract is intended to operate in restraint of lawful trade, or free competition in lawful trade or commerce . . .".

part of the defendant seven major oil companies[8] to eliminate plaintiff and other Libyan independents as competitors.

Preliminary to a detailed consideration of the defendants' challenge to these claims, a brief reference is desirable to the extended factual background against which the claims are alleged. The plaintiff's charges center about oil production in two areas, Libya and the Persian Gulf. Libya and the other oil producing countries are members of the Organization of Petroleum Exporting Countries ("OPEC"). The seven majors are vertically integrated.[9] Six of the seven produce oil in both areas, but the Persian Gulf fields are far more significant to them since this area contains ten times the oil in Libya. Plaintiff was a non-integrated independent producer who operated in Libya at exploration and production levels. Other independent producers of oil in Libya were Occidental Petroleum Corporation, Gelsenberg AG, a West German corporation, and Grace Petroleum Corporation, also named herein as defendants.

Plaintiff alleges that as production of oil in Libya by him and other independents increased substantially, the domination by the seven majors of world trade in crude oil was threatened, and that as the non-majors expanded their share of Libyan production, attempts were made as early as 1965 by one or more majors to eliminate cost advantages enjoyed by the non-majors' fast increasing Libyan production over the majors' Persian Gulf production.

[8] Mobil Oil Corporation, Exxon Corporation, Shell Petroleum Company, Ltd., Texaco, Inc., Standard Oil Company of California, The British Petroleum Company, Ltd. and Gulf Oil Corporation.

[9] Their functions include the exploration for and production of crude oil, the refining of crude oil, the transportation of crude oil and of refined petroleum products, and the marketing of refined petroleum products.

In late 1969 Libya threateningly demanded changes in existing agreements with oil companies operating in Libya which increased the government's share of "take" in these companies' profits from such oil production. Libya's success in enforcing such terms in its 1970 agreements with all Libyan producers prompted the Persian Gulf countries to make similar demands on the companies operating in their territories. Following formulation of these Persian Gulf demands in December 1970, Libya, early in January 1971, despite concluded agreements, demanded new price and tax increases, particularly from plaintiff Hunt and from defendant Occidental, and gave them until January 16, 1971 to accept these "non-negotiable demands." Fearing a continuation of this pattern of escalating demands by Libya and then by Persian Gulf countries ("leapfrogging," as the parties term it), executives of the seven majors met secretly in January 1971 to concert their response to the latest demands of Libya, OPEC and the Persian Gulf members of OPEC.

Originally, the seven majors did not include plaintiff or any of the other Libyan independents in their conferences or plans to present a united front in resisting the demands of the oil producing countries, although their immediate concern was the prospect of escalation of Persian Gulf countries' demands if either Hunt or Occidental agreed to Libya's new terms. The seven majors sought a clearance letter from the Department of Justice, but the Department insisted upon the inclusion of the independent Libyan oil producers as a condition of stating it had no present intention to bring an enforcement proceeding under the antitrust laws by reason of the contemplated concert of action by the seven majors. Plaintiff alleges that for this reason he and the other independents were belatedly invited to participate in the sessions. Plaintiff further alleges that another purpose of the seven majors in admitting Hunt and the other Libyan producers to their meetings was to obtain control over them in order to prevent any of them from accepting any terms laid down by Libya which might set an undesirable precedent for negotiations with the Persian Gulf countries, where the seven majors had their principal interest, or from otherwise acting in conflict with the interests of the seven majors.

Hunt alleges that at these meetings the parties resolved to present a united front in dealing with Libya and the other OPEC countries and despite his objections to some of the key features of the proposed agreement, he acquiesced based upon assurances by the parties that they would support him by supplying him with oil if his own supply were cut off by Libya. In any event, plaintiff and the defendants reached an agreement on January 15, 1971, referred to as the Libyan Producers' Agreement (the "Agreement"), which is at the core of this litigation.

The clear purpose of the Agreement, acknowledged by all the parties, was to deal collectively with the demands of Libya and the other oil producing countries. Each party to the Agreement declared his or its intention not to make any agreement or offer of agreement with the Libyan government with respect to the "government take" of crude oil without the consent of the other parties, and to endeavor before making any agreement with the Libyan government to include a requirement that the Libyan government deal with the other concessionnaires on comparable terms.[10]

[10] However, ¶ 1 of the Agreement provides:
"[N]othing . . . shall obligate any company to take or refrain from taking any action if to do so would, in its opinion, be contrary to its vital interests."

A principal feature of the Agreement was its "sharing" provision. In general, the Agreement provided that if the party's crude oil production in Libya was cut back as a result of government action, all other parties would share in such cut back as provided in the Agreement. And if there was insufficient Libyan oil to meet, the contractual obligations due to restrictions or shut down by the Libyan government, those parties with Persian Gulf production would supply the Libyan producers who were cut back with Persian Gulf oil at cost. However, this obligation was limited to supply such Persian Gulf oil only to meet commitments to preexisting European and Western Hemisphere customers.[11] Plaintiff Hunt had three such customers at that time, all of whom were signatories to the Agreement, and two of whom were among the seven majors Exxon and Shell).

Plaintiff alleges that despite his objections to certain aspects of the Agreement, particularly to the preexisting customer and market restriction clause, he signed the Agreement for a number of reasons: the pressure of the January 16 deadline set by Libya for response to its latest "Non-negotiable" demands; the fact that industry-wide and OPEC-wide negotiations were preferable to individual negotiations with Libya; a misplaced confidence in the good faith and expressed intention of the other parties, and the fear that he would be boycotted if he refused to sign.[12]

[11] This preexisting customer provision did not apply to any Libyan oil supplied to a producer who had been cut back.

[12] Plaintiff's consent to and participation in the Agreement of which he now complains does not prevent him from seeking the protection of the antitrust laws since the Supreme Court has held that "the doctrine of *in pari delicto* . . . is not to be recognized as a defense to antitrust action." *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 140, 88 S.Ct. 1981, 1985, 20 L.Ed.2d 982 (1968). *See also Trebuhs Realty v. News Syndicate Co.*, 107 F.Supp. 595, 599-601 (S.D.N.Y. 1952).

THE FIRST ANTITRUST CLAIM

(a) *The preexisting customer provision.*

Plaintiff Hunt in essence charges that defendants, horizontal competitors of each other and of Hunt, violated the antitrust laws by the provision of the Agreement that imposed upon him a restriction against the resale of Persian Gulf oil to any other than a preexisting European or Western Hemisphere customer, with the purpose and intended effect of foreclosing him from competing with defendants for new customers or in new markets. He further charges that he was the only party to the Agreement without refining capacity of his own, which the parties knew; that he had only three eligible or preexisting customers, all of whom were parties to the Agreement; that the effect of confining him to those customers was not only to foreclose him from seeking new customers wherever located, but also to enable the three to deal with him free from competitive forces and thus to extract from him wholly uncompetitive prices. Plaintiff contends that as a result of these acts and conduct of the defendants he sustained a loss of many millions of dollars.

On its face plaintiff's charge that the customer and market restrictions contained in the Agreement constituted a per se violation of the Sherman Act and the Wilson Tariff Act appears to be of substance under the Supreme Court decisions in *United States v. Arnold, Schwinn & Co.*[13] and *United States v. Topco Associates, Inc.*[14] In sum, plaintiff's position is that no matter how well intentioned and whatever the defendants' motivation in seeking to protect them-

[13] 388 U.S. 365, 382, 87 S.Ct. 1856, 18 L.Ed.2d 1249 (1967).

[14] 405 U.S. 596, 607-11, 92 S.Ct. 1126, 31 L.Ed.2d 515 (1972).

selves against the ever increasing demands of the oil producing countries, the provision of the Agreement which restricted plaintiff to preexisting customers and geographical territories, in effect, a regulation of customers to whom and where he could sell crude oil, constitued a per se violation which forecloses application of the rule of reason.[15]

However, the defendants challenge the very foundation of this antitrust claim by raising the threshold question of whether the agreement to provide Persian Gulf oil to the parties whose supply was cut off by Libya was truly an agreement for the sale and purchase of oil, or whether it was in effect an insurance or risk allocation mechanism which by its very nature did not entail a restraint of trade subject to the antitrust laws. Among other matters, they argue that the preexisting customer clause under which oil was supplied to plaintiff was not an agreement to buy or sell, but rather "a sharing in the loss arrangement," of special benefit to plaintiff, since he was one of the most vulnerable of the parties to attack by Libya. Accordingly, defendants contend that the preexisting customer clause attached to the oil supply provision is beyond the proscription of the Sherman Act. Whatever the force of this contention, it goes to the merits of the parties' respective positions. Thus the issue is not one to be decided on a motion to dismiss, since its resolution requires an interpretation of the contract and the circumstances surrounding its execution.[16]

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[15] *Cf. United States v. Topco Associates, Inc.*, 405 U.S. 596, 607-11, 92 S.Ct. 1126 (1972).

[16] *Pehar v. Local No. 181 of the International Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers of America, AFL-CIO*, 311 F.2d 628, 636 (6th Cir. 1962); *Machen v. Johansson*, 174 F.Supp. 522, 527 (S.D.N.Y.1959); *Farrand Optical Co. v. United States*, 107 F.Supp. 93, 96 (S.D.N.Y.1952).

A matter of significance which would have to be considered is the so-called option to the Persian Gulf suppliers to pay cash in lieu of supplying oil. Under this provision, upon its face, the Persian Gulf producers who were "obligated to supply but [have] not supplied" such oil were permitted to pay cash to those Libyan producers whose supply had been cut off.[17] However, as the court noted at the argument of the motion to dismiss, this option provision "is rather clear except for one item at the end,"[18] which reads: "[E]ach of the Persian Gulf Producers Parties states its present intention is to supply Persian Gulf crude oil in discharge of its obligations under paragraphs 2(e) and 3." When questioned upon argument as to the meaning of that provision of the contract, counsel for the movants replied that it "has no meaning except an expression of intention which they [the Persian Gulf suppliers] were free to ignore at any time." Presumably its inclusion had some purpose;[19] otherwise if the Persian Gulf producers had "no present intention . . . to supply Persian Gulf crude oil in

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[17] Paragraph 4 of the Agreement provides in pertinent part:

"In respect of each barrel of Persian Gulf crude oil a party is obligated to supply but has not supplied under paragraph 2(e) or 3:

(a) Such party shall have the option to elect to pay 10 cents; provided if such option is elected it shall apply pro rata as to every party to whom such Persian Gulf Producing Party has such an obligation."

[18] Transcript of hearing, July 15, 1975, p. 79.

[19] *National Equip. Rental Ltd. v. Reagin*, 338 F.2d 759, 762-63 (2d Cir. 1964). *See also Hanley v. James McHugh Const. Co.*, 444 F.2d 1006, 1009 (7th Cir. 1971); *United States v. N. A. Degerstrom, Inc.*, 408 F.2d 1130, 1133 (9th Cir. 1969).

discharge" of their obligations, a substantial question of fraud may come into play.[20]

The plaintiff, in the light of this and other provisions and circumstances surrounding the making of the Agreement, disputes defendants' position that the parties intended the option to pay cash to be a complete alternative, unlimited in scope or duration, to supplying oil. Apart from these contentions, plaintiff points to the fact that the supply clause also provides that the exercise of the option must apply pro rata to every party to whom the Persian Gulf parties owe oil, and if they supplied oil to one obligee, they were without power to enforce a cash option provision against another obligee. Moreover, the payment of cash instead of supplying oil could, in the instance of the plaintiff, whose supply of Libyan oil was completely cut off, effectively eliminate him as a competitor in the crude oil market. Thus, the defendants' contention that the plaintiff's first claim is beyond the reach of the antitrust laws involves questions of fact which cannot be resolved on a motion to dismiss for failure to state a claim.[21]

The defendants, assuming arguendo that the Agreement at issue is covered by the Sherman Act, make a further attack upon plaintiff's first claim (as well as his other antitrust claims) upon a variety of grounds.

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[20] *Deyo v. Hudson*, 225 N.Y. 602, 611-12, 122 N.E. 635 (1919); *Adams v. Gillig*, 199 N.Y. 314, 319-22, 92 N.E. 670 (1910). *See also Schenley Distillers Corp. v. Renken*, 34 F.Supp. 678, 680-82 (E.D.S.C. 1940); *Terris v. Cumminskey*, 11 A.D.2d 259, 261, 203 N.Y.S.2d 445 (3d Dep't 1960); *Sabo v. Delman*, 3 N.Y. 2d 155, 160, 164 N.Y.S.2d 714, 143 N.E.2d 906 (1957).

[21] *Wolman v. Tose*, 467 F.2d 29, 35 (4th Cir. 1972); *Wilshire Oil Co. of Texas v. Riffe*, 409 F.2d 1277, 1284 (10th Cir. 1969); *Zell Ins. Agency, Inc. v. Guaranty Security Ins. Co.*, 399 F.2d 147, 148-49 (5th Cir. 1968); *Dobson v. Masonite Corp.*, 359 F.2d 921, 923-24 (5th Cir. 1966).

(b) *The "target area" argument.*

Preliminarily, defendants urge that plaintiff lacks standing to raise any of his antitrust claims because he cannot, as required by the court in *Billy Baxter, Inc. v. The Coca-Cola Company*,[22] "allege a causative link to his injury which is 'direct' rather than 'incidental' or which indicates that his business or property was in the 'target area' of the defendant's illegal act."

In view of the fact that plaintiff was in direct competition with the defendants,[23] their contention is somewhat difficult to understand. To equate plaintiff's position to one whose alleged injury could be regarded only as "remote," "incidental" or "consequential" rather than "direct"[24] is to disregard the reality of the relationship of the parties and the allegations of the complaint. It is true, as defendants argue, that the "target" or objective of the collective efforts of the defendants was not the plaintiff, but rather the oil producing countries, as manifested by defendants' united front. However, plaintiff certainly was within the "target area" of the oil supply provision of their agreement, which is the crux of his first cause of action. Indeed, according to his claim as a competitor he was in the direct line of fire. Spe-

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[22] 431 F.2d 183. 187 (2d Cir. 1970), *cert. denied*. 401 U.S. 923. 91 S.Ct. 877, 20 L.Ed. 2d 826 (1971).

[23] *Cf. Calderone Enterprises Corp. v. United Artists Theatre Circuit, Inc.*, 454 F.2d 1292, 1295 (2d Cir. 1971). *cert. denied*. 406 U.S. 930, 92 S.Ct. 1776, 32 L.Ed.2d 132 (1972), where our Court of Appeals stated: "this court has committed itself to the principle that in order to have 'standing' to sue for treble damages under § 4 of the Clayton Act, a person must be within the 'target area' of the alleged antitrust conspiracy, i.e., a person against whom the conspiracy was aimed, *such as a competitor of the persons sued.*" (emphasis supplied.)

[24] *Cf. Data Digests, Inc. v. Standard of Poor's Corp.*, 43 F.R.D. 386, 387 (S.D.N.Y. 1967).

cifically, under his version of the facts, plaintiff charges that the preexisting customer clause was imposed not only over the protest, but was intentionally directed toward him for the very purpose of impairing his existing relationship with his customers and eliminating him from competition, causing him direct losses. Since plaintiff was not merely "incidentally" or "remotely" affected by this provision of the Libyan Producers' Agreement, as, for instance one of his customers or creditors might have been, the defendants' reliance upon the recently decided *Long Island Lighting Company v. Standard Oil Company of California* and *Consolidated Edison Company of New York v. Standard Oil Company of California*[25] is misplaced.

Defendants' related attack for lack of direct causal connection between their alleged unlawful conduct and plaintiff's claimed injury likewise must fail. Apart from the fact that the complaint does plead, in instance after instance, that plaintiff was damaged in that the preexisting customer restriction foreclosed him from new customer and geographical markets, he charges that his existing customers, aided by other defendants and as part of their conspiratorial purpose, exploited the restrictions to force uncompetitive prices upon him, causing him to sustain losses in the millions. In any event, as this court has held, "the causation issue should not be resolved at this [pleading] stage of the action."[26]

(c) *The alleged inapplicability of the antitrust laws.*

Here the defendants contend that the antitrust laws were never intended to apply to American companies in their dealings with a foreign government acting in its sovereign

[25] 521 F.2d 1269 (2d Cir. 1975).

[26] *Data Digests v. Standard & Poor's Corp.*, 43 F.R.D. 386, 388 (S.D.N.Y. 1967).

capacity. They rely upon the doctrine originally articulated in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*,[27] and further elucidated in *United Mine Workers of America v. Pennington*,[28] that:

> "the Sherman Act does not prohibit two or more persons from associating together in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or a monopoly."[29]

The so-called *Noerr-Pennington* doctrine is founded upon the individual's constitutional right of petition under the First Amendment and upon the corresponding concern that the representatives in the legislatures retain access to the opinions of their constituents, unhampered by collateral regulation.[30] These interests are not present in plaintiff's first claim, since his primary concern is not with any action on the part of defendants to procure passage or enforcement of any law, but rather with the clause of the Agreement which contains the customer and market restriction which is a strictly "private commercial activity" expressly excluded from the immunity of *Noerr-Pennington* by the Court in *Continental Ore Company v. Union Carbide & Carbon Corporation.*[31]

(d) *The act of state doctrine.*

Defendants also urge that plaintiff's first claim, as well as his two other antitrust claims, are foreclosed by the act of state doctrine. This doctrine was originated in *Underhill v.*

[27] 365 U.S. 127, 136, 81 S.Ct. 523, 5 L.E.2d 464 (1961).

[28] 381 U.S. 657, 669-70, 85 S.Ct. 1585, 14 L.Ed.2d 626 (1965).

[29] *Eastern R. R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 136, 81 S.Ct. 523, 529 (1961).

[30] *Id.* 137-38, 81 S.Ct. 523.

[31] 370 U.S. 690, 707, 82 S.Ct. 1404, 8 L.Ed. 2d 777 (1962).

Hernandez,[32] and precludes judicial inquiry into the public acts of a foreign government within that sovereign's own territory. It is based on "[c]onsiderations of comity, and of the highest expendiency," and particularly on the notion that "[i]t would be not only offensive and unnecessary, but it would imperil the amicable relations between governments, and vex the peace of nations, to permit the sovereign acts or political transactions of states to be subjected to the examination of the legal tribunals of other states."[33] The doctrine has been held by the Supreme Court to bar a claim for antitrust injury flowing from a sovereign's acts which were induced by or procured by the defendant in the action.[34] However, the concept has no bearing on plaintiff's first claim because resolution of the issues raised thereunder does not in any way require an inquiry into the judgment, the conduct or acts of the Libyan government, or any alleged conduct by the defendants which allegedly induced action by the Libyan government.[35] Rather, inquiry would be confined to the preexisting customer restriction contained in the parties' Agreement.[36]

Once again, defendants, by concentrating on the broad purposes of the Libyan Producers' Agreement to present a

[32] 65 F. 577, 579 (2d Cir. 1895), *aff'd*, 168 U.S. 250, 18 S.Ct. 83, 42 L.Ed. 456 (1897).

[33] *Id.* 579.

[34] *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 357-58, 29 S.Ct. 511, 53 L.Ed. 826 (1909).

[35] *Cf. Occidental Pet. Corp. v. Buttes Gas & Oil Co.*, 331 F.Supp. 92, 110 (C.D.Cal.1971), *aff'd per curiam*, 461 F.2d 1261 (9th Cir.). *cert. denied*, 409 U.S. 950, 93 S.Ct. 272, 34 L.Ed.2d 221 (1972).

[36] Insofar as plaintiff's first claim raises the issue of the manipulation of Libyan tax laws by the seven majors, or any one of them, this reference is clearly for the purpose of setting a background and is not relied on by plaintiff to prove his claim of unlawful restriction of markets and customers.

united front in meeting the ever increasing demands of Libya and the other oil producing countries, disregard that plaintiff's first claim is premised entirely under the particular provision of the Agreement which limits his resale of oil received from Persian Gulf producer defendants to particular markets and customers. That provision does not involve any question of Libyan conduct. At issue is the restriction contained therein and not the governmental acts of a foreign sovereign. Thus, the act of state doctrine is unavailable on defendants' motion to dismiss the first claim.

(e) *The "ancillary restraint" doctrine.*

In substance the defendants repeat and emphasize their contention that the Agreement, unlike the ordinary agreement for the purchase and sale of crude oil, was in effect a mutual assistance pact which served as protection for a Libyan producer whose production was cut back; that a preexisting customer was a condition precedent for such a Libyan producer to obtain Persian Gulf oil, which measured the obligation of the Persian Gulf producers to supply oil and limited their liability thereunder. Accordingly, defendants urge that the preexisting customer clause is ancillary to the Libyan Producers' Agreement and is reasonably necessary to the goals of that Agreement. This argument perforce acknowledges that restraints are imposed, but even so, the defendants contend they are reasonable and immune from antitrust attack because they fall within the protection of the "ancillary restraint" doctrine. This concept, first articulated in *United States v. Addyston Pipe & Steel Co.*,[37] recognizes such a defense where the restraint is "merely ancillary to the main purpose of a lawful contract, and

[37] 85 F. 271, 282 (6th Cir. 1898), *aff'd*, 175 U.S. 211, 20 S.Ct. 96, 44 L.Ed. 136 (1899).

necessary to protect the covenantee in the enjoyment of the legitimate fruits of the contract, or to protect him from the dangers of an unjust use of those fruits by the other party."

The plaintiff responds that defendants' ancillary restraint contention is flawed in several respects. First, he argues that the preexisting customer clause, with its customer and territorial restraints, is unlawful per se, which renders the doctrine inapplicable in the light of *United States v. Arnold, Schwinn & Co.*[38] Plaintiff, further argues that the doctrine is unavailable to defendants since it presupposes the existence of a lawful contract. Plaintiff claims the Libyan Producers' Agreement was forced upon him by the seven majors in furtherance and continuance of a preconceived anti-competitive purpose and thus is unlawful.

Next, he argues that even assuming a lawful contract, the restraint was neither reasonable nor necessary since it went far beyond what was required for the protection of the Persian Gulf producers insofar as they were obligated to supply oil. The defendants contend that it was reasonably necessary in order to limit the Persian Gulf producers' risk as obligors under the oil supply provision. These differing contentions present an issue of fact which must await trial.

THE SECOND ANTITRUST CLAIM

Under his second claim, plaintiff alleges that since at least 1970 the defendants and others engaged in a combination or conspiracy in violation of the antitrust laws;[39] that as

[38] 388 U.S. 365, 380-82, 87 S.Ct. 1856, 18 L.Ed.2d 1249 (1966). *See United States v. Glaro Group Ltd.*, 302 F.Supp. 1, 10-11 (D.D.C. 1969), *rev'd on other grounds*, 410 U.S. 52, 93 S.Ct. 861, 35 L.Ed.2d 104 (1973).

[39] 15 U.S.C. §§ 1, 8.

part of their unlawful conduct, and acting in concert, they conspired to and did withhold ninety million barrels of crude oil to him under the Libyan Producers' Agreement; that they agreed to boycott him to deprive him of crude oil needed to fulfill his contracts with his customers. He further alleges that as a result of such group action he not only lost profits he would have made on the resale of the withheld oil, but also lost his existing contracts, opportunities for their renewal and access to new customers and markets; and finally that he was eliminated as a source of crude oil in the world crude oil market.

The defendants seek dismissal of this antitrust claim upon the same grounds, among others, which were advanced against the first claim. Substantially the same analysis which required rejection of those objections directs a similar result as to this claim. Thus, defendants advance the "target area," "act of state doctrine," and inapplicability of the antitrust laws, as well as other objections. Again defendants consider the Libyan Producers' Agreement only in its overall function to present a united front against OPEC countries, but ignore the specific provision of that Agreement upon which plaintiff centers his charge of antitrust activity by defendants. Here plaintiff is contesting the defendants' use or abuse of the oil supply provision as an instrument to further a conspiracy to eliminate him as a competitor, which he alleges was in existence before the Agreement was executed.

Plaintiff, as in the first claim, is directly in the "target area" of this clause so that he has standing to charge that defendants' "refusal to deal" and the "group boycott," which also constituted a breach of the terms of their Agreement, were with the intent and effect of harming him.

Plaintiff's "act of state" contention and the inapplicability of the antitrust laws, based upon the *Noerr-Pennington*[40] doctrine is as misdirected to this claim as it was to the first claim. Consideration of the supply provision of the Agreement and its claimed breach in furtherance of the defendants' alleged purpose to eliminate him as a competitor does not require inquiry into the acts of Libya or any other foreign state.

Defendants further contend, as they did under the first claim, that the oil supply provision is not a contract for the sale of oil, but merely an insurance or mutual help mechanism which does not impose an unreasonable restraint and thus is not subject to antitrust attack. But again, the validity of this contention centers about questions of fact as to this aspect of the Agreement, resolution of which is foreclosed on a motion to dismiss for failure to state a claim.

Defendants raise an additional objection to the second antitrust claim. They assert that this claim is one for breach of contract for failure to deliver a balance of ninety million barrels of crude oil due under the Libyan Producers' Agreement, which does not give rise to an antitrust claim. But again defendants ignore the allegations of the complaint, which go much beyond a charge that each defendant reneged on its commitment to the plaintiff. The defendants' contention that plaintiff "was denied access to oil by action of the Libyan government, not the defendants."[41] is simplistic. It is true that the nationalization of Hunt's concession by Libya deprived him of an oil supply, but in that event the

[40] *Eastern R. R. Presidents Conference v. Noerr Mortor Freight, Inc.*, 365 U.S. 127, 137, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961); *United Mine Workers of America v. Pennington*, 381 U.S. 657, 669-70, 85 S.Ct. 1585, 14 L.Ed.2d 626 (1965).

[41] Reply memorandum p. 7.

defendants agreed to supply him with Libyan oil, and if that were unavailable, with Persian Gulf oil to meet commitments to his existing customers. Hunt's specific claim is that the Persian Gulf defendants, acting in concert with others, failed to live up to that obligation; that the withholding of the ninety million barrels due him was encompassed within the alleged conspiracy to boycott him and eliminate him as a competitor.

Whether plaintiff can support his charges and show that a group boycott existed, and that its nature and extent was such as to constitute a violation of the Sherman Act presents an issue of fact, the resolution of which must await another day.

For all the above reasons, the defendants' motion to dismiss the first and second claims must be denied.

THE THIRD ANTITRUST CLAIM

In this instance, too, plaintiff alleges that at least since 1970 the seven majors, along with others, named and unnamed conspired or combined in violation of the Sherman Act and Wilson Tariff Act to preserve the competitive advantage of Persian Gulf crude oil relative to that of Libyan crude oil and to diminish competition from Libyan oil producers; that to effect this purpose they conspired to prevent plaintiff Hunt and other Libyan producers from reaching an agreement with the Libyan government inconsistent with this competitive advantage; that in furtherance thereof, after obtaining Hunt's consent to the Libyan Producers' Agreement, which contemplated united front negotiations with Libya and other OPEC countries, the seven majors abandoned the agreed upon collective policy and manipulated the course of the Libyan negotiations so as to advance their own interests to the detriment of Hunt; and generally

that the defendants deliberately pursued a course of action which led to the nationalization of Hunt's concession in Libya and his elimination as a Libyan crude oil producer.

In the light of plaintiff's aforesaid charges, the defendants' "act of state" plea rests on a solid foundation. The manipulative course of conduct attributed to the seven majors following the signing of the Libyan Producers' Agreement centers about negotiations and dealings with and action thereafter taken by, the Libyan government. Hunt charges that in consequence he was forced to enter into arrangements with the Libyan government that were detrimental to him and beneficial to the seven majors; his personnel were evicted by Libya from the Sarir field upon his refusal, induced by the seven majors, to market British Petroleum's production from its half of the Sarir Field[42] which Libya had nationalized; his oil production was cut back fifty per cent by Libya; his right to produce and export oil was terminated following his resistance, again based upon defendants' inducement, to Libya's demand for increased equity participation in his interests in Sarir; finally, all his assets were nationalized by Libya. The aforesaid claimed consequences of defendants' manipulative course of action all involve acts of the Libyan government which appear to be within the prescription of the act of state doctrine.

But Hunt seeks to avoid the impact of this doctrine upon several grounds. First, he argues the third claim "challenges no act by the Libyan government, and does not ask this Court to sit in judgment on the acts of a sovereign state. As pleaded, the wrong done to Hunt was caused prior to any act by the Libyan government, for it was caused when the

[42] Hunt had the concession on the other half.

defendants entered into a conspiracy to advance their own Persian Gulf interests at his expense and to eliminate him from the industry." Although it may be, as plaintiff asserts, that the alleged conspiracy originated late in 1970, the acts and conduct of the defendants in furtherance thereof were committed after the signing of the Agreement in January 1971. True, inquiry may be properly directed to the acts and conduct of the seven majors and their codefendants, allegedly constituting their manipulative course of action. But the matter does not end there. To establish his claim plaintiff would have to show that such acts and conduct were a material cause of his alleged damage;[43] that but for defendants' conspiratorial manipulative activities the Libyan government would not have cut back his production, shut off his oil supply completely and then nationalized his properties. This clearly would require inquiry into acts and conduct of Libyan officials, Libyan affairs and Libyan policies with respect to plaintiff's as well as other oil producers' properties and the underlying reasons for the Libyan government's actions.

In *Occidental Petroleum Corporation v. Buttes Gas & Oil Co.*,[44] the facts of which substantially parallel those of the

[43] *Winkeler & Smith Citrus Prods. Co. v. Sunkist Growers, Inc.*, 346 F.2d 1012, 1014 n. 1 (9th Cir.), *cert. denied*, 382 U.S. 958, 86 S.Ct. 433, 15 L.Ed.2d 362 (1965). *See also Credit Bureau Reports, Inc. v. Retail Credit Co.*, 476 F.2d 989, 992 (5th Cir. 1973); *Sam S. Goldstein Indus., Inc. v. Botany Indus., Inc.*, 301 F.Supp. 728, 733-34 (S.D.N.Y.)1969); *National Auto Brokers Corp. v. General Motors Corp.*, 60 F.R.D. 476, 489-90 (S.D.N.Y.1973). Thus, the Supreme Court, in *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*, 364 U.S. 656, 660, 81 S.Ct. 365, 5 L.Ed.2d 358 (1960), indicated that, in a private treble damage action under § 1 of the Sherman Act, plaintiff must adequately allege that he was "damaged" by the violation of the Act.

[44] 331 F.Supp. 92, 107 (C.D.Cal.1971), *aff'd per curiam*, 461 F.2d 1261 (9th Cir.), *cert. denied*, 409 U.S. 950, 93 S.Ct. 272, 34 L.Ed. 2d 221 (1972).

instant case, plaintiff charged that the defendant had "induced and procured" various foreign governmental authorities to do certain executive acts which deprived plaintiff of its concession for oil production. The court found that the act of state doctrine, as set forth in *American Banana Company v. United Fruit Company*,[45] was the "relevant and dispositive principle."[46] The court specifically considered the contention, heavily relied upon by Hunt here, that the doctrine was inapplicable because plaintiffs were not complaining "of the acts of foreign states set forth in the complaint, but rather only of the defendants' conduct in 'catalyzing' those acts."[47] As a major item in rejecting plaintiffs' efforts to avoid the impact of the act of state doctrine, the court stated that "[b]ecause a private antitrust claim requires proof of damage resulting from forbidden conduct . . . plaintiffs necessarily ask this court to 'sit in judgment' upon the sovereign acts pleaded, whether or not the countries involved are considered co-conspirators."[48] The court followed *American Banana* and granted the defendants' motion to dismiss. Here the operative facts are even more strikingly similar to *American Banana* than they were in *Occidental*, since the foreign act of state complained of in *American Banana* was the nationalization of plaintiffs' production facilities.

[45] 160 F. 184 (C.C.S.D.N.Y.), *aff'd*, 166 F. 261 (2d Cir. 1908), *aff'd*, 213 U.S. 347, 29 S.Ct. 511, 53 L.Ed. 826 (1909).

[46] *Occidental Petroleum Corp. v. Buttes Gas & Oil Co.*, 331 F.Supp. 92, 108 (C.D.Cal.1971) *aff'd per curiam*, 461 F.2d 1261 (9th Cir.), *cert. denied*, 409 U.S. 950, 93 S.Ct. 272, 34 L.Ed.2d 221 (1972).

[47] *Id.* 110.

[48] *Id.*

Next, plaintiff urges that the Supreme Court, in *United States v. Sisal Sales Corp.* [49] and *Continental Ore Co. v. Union Carbide & Carbon Corp.*,[50] created an exception to *American Banana*, which applies to his third claim. In *Sisal*, the Court explicitly distinguished *American Banana* on the ground that the conspiracy in *Sisal* was "made effective by acts done" within the United States and thus was not" '[a] conspiracy in this country to do acts in another jurisdiction,' "[51] as was the case in *American Banana* and is the case presently before this court. In *Continental Ore*, the Court rested its decision on similar grounds, but also emphasized that no "official within the structure of the Canadian Government"[52] was involved.

It may well be that recent public disclosure of the dealings of multi-national corporations with foreign governments which have an adverse impact upon American interests justifies a reappraisal of the act of state doctrine to determine whether its scope should be confined. However, in the absence of new doctrinal trends in Supreme Court opinions, reassessment of the range of the doctrine must rest with that Court and not this court.[53] Accordingly, the defendants' motion to dismiss the third claim is granted.

[49] 274 U.S. 268, 47 S.Ct. 592, 71 L.Ed. 1042 (1927).

[50] 370 U.S. 690, 82 S.Ct. 1404, 8 L.Ed.2d 777 (1962).

[51] *United States v. Sisal Sales Corp.*, 274 U.S. 268, 276, 47 S.Ct. 592, 593, 71 L.Ed. 1042 (1927).

[52] 370 U.S. 690, 706, 82 S.Ct. 1404, 1414, 8 L.Ed.2d 777 (1962).

[53] *Cf. United States v. Ullman*, 221 F.2d 760, 761-62 (2d Cir. 1955), *aff'd*, 350 U.S. 422, 76 S.Ct. 497, 100 L.Ed. 511 (1956). *See also Booster Lodge No. 405, Int'l Ass'n of Machinists and Aerospace Workers, AFL-CIO v. National Labor Relations Bd.*, 148 U.S.App.D.C. 119, 459 F.2d 1143, 1150 n. 7 (1972); *United States Gypsum Co. v. United Steelworkers of America*, 384 F.2d 38, 44 (5th Cir. 1967), *cert. denied*, 389 U.S. 1042, 88 S.Ct. 783, 19 L.Ed.2d 832 (1968); *United States v. Finazzo*, 288 F.2d 175, 177 (6th Cir. 1961); *G. I. Distributors, Inc. v. Murphy*, 336 F.Supp. 1036, 1037 (S.D.N.Y. 1972).

THE BREACH OF CONTRACT CLAIM

Plaintiff alleges that defendants breached the Libyan Producers' Agreement by failing to supply him with ninety million barrels of Libyan and/or Persian Gulf crude oil due to him thereunder, and as a result he sustained damages of at least ninety million dollars.

All defendants move to stay all proceedings with respect to the breach of contract claim pending arbitration pursuant to the arbitration provision in the Agreement.[54] However, only one defendant, Texaco, has served a demand that the claim be submitted to arbitration. Thereupon plaintiff moved to stay Texaco's proposed arbitration pending determination of his antitrust claims, now reduced to two. That the fourth claim is subject to arbitration under the Agreement is beyond dispute. The issue, however, is whether that claim should be submitted to arbitrators for their determination at the same time that plaintiff's antitrust claims go forward in this court for judicial determination.

It is now cardinal doctrine that the public interest in the enforcement of the antitrust laws makes antitrust claims inappropriate subjects for arbitration.[55] As a corollary, a stay of antitrust judicial proceedings in favor of arbitration will not be granted where the arbitrators would be required to consider antitrust issues with respect to the

[54] Paragraph 9(d) of the Agreement reads as follows: "Any controversy or claim arising out of or relating to this contract or the breach thereof shall be settled by arbitration. . . ."

[55] *American Safety Equip. Corp. v. J. P. Maguire & Co.*, 391 F.2d 821-28 (2d Cir. 1968). *See also Cobb v. Lewis*, 488 F.2d 41, 47 (5th Cir. 1974); *Helfenbein v. International Indus., Inc.*, 438 F.2d 1068, 1070 (8th Cir.), *cert. denied*, 404 U.S. 872, 92 S.Ct. 63, 30 L.Ed.2d 115 (1971); *A. & E. Plastik Pak v. Monsanto Co.*, 396 F.2d 710, 715-16 (9th Cir. 1968).

controversy to be determined by them.[56] Thus the precise question presented by the respective motions is whether the antitrust issues so permeate the entire case that it would not be "easy for an arbitrator to separate the antitrust issues from the other issues in the case, and to proceed to decide the arbitrable issues without inquiry into the antitrust issues."[57]

The defendants argue that the arbitrator would not be required to resolve the antitrust claims and, by way of example, add "if questions were to arise as to the meaning of particular words or clauses in the contract, an arbitrator would be able to determine these matters without delving into antitrust issues." But the meaning of particular words or clauses in the contract is included among other issues the court would have to consider under the first and second antitrust claims.

The alleged breach of contract is an essential ingredient of plaintiff's second antitrust claim. The hard thrust of plaintiff's charge is that the withholding of ninety million barrels of oil due him under the supply provision was not only a breach of the Agreement, but also a concerted refusal to deal with him and a group boycott in furtherance of the conspiracy to eliminate him as a competitor. Thus what is at issue is not a mere breach of contract, which to be sure is within the competence of an arbitrator's determination and by itself, if isolated, would not involve antitrust issues. However, the court will have to decide whether a breach of the oil supply provision occurred, and if so, whether it was committed by defendants individually or

[56] *American Safety Equip. Corp. v. J. P. Maguire & Co.*, 391 F.2d 821, 828 (2d Cir. 1968).

[57] *Cobb v. Lewis*, 488 F.2d 41, 50 (5th Cir. 1974).

acting in concert and with the purpose and intent of eliminating him or injuring him as a competitor.

Also at issue are the parties' conflicting positions as to the option clause under the oil supply provision. The defendants contend that the option clause gave them an absolute, unrestricted right to pay cash instead of supplying oil. Obviously this would be advanced as a defense in the arbitration. Plaintiff's differing version that the payment of cash could not be used to freeze him out of oil to which he was entitled, and thereby to eliminate him as a competitor, is a central issue under the antitrust charge.

It is unrealistic to assert, as defendants do, that the breach of contract claim can be isolated so that the arbitrator can decide the issues thereunder without inquiry into the matters that are material to the antitrust claims. The breach of contract and antitrust claims are so inextricably interrelated, one with the other, that it would not be easy, in the light of the parties' contentions, for the arbitrators to avoid wandering into the thicket of complex antitrust issues.

If anything, Texaco's demand for arbitration demonstrates that its purpose indeed is to have the arbitrator consider plaintiff's antitrust claims. The commencement of this very lawsuit and the assertion of the antitrust claims[58]

[58] The second dispute presented by Texaco's demand is the following:

> "2. You have breached the promise you made in the contract which induced Texaco to enter into the contract with you and upon which Texaco relied in conferring valuable benefits to you thereunder. The contract contains the following essential promise:
>
> 'Each party hereto covenants that it will not assert any claim against any other party or parties arising out of this agreement, except claims for non-performance of this agreement.'
>
> In *your aforementioned lawsuit,* [this action] you purport to assert claims against Texaco arising out of the contract for other than its non-performance, thereby breaching your covenant and depriving Texaco of the consideration for the valuable benefits Texaco delivered to you pursuant to the contract." (emphasis supplied.)

are alleged by Texaco to constitute a breach of contract by Hunt, which Texaco asserts is arbitrable and which it seeks to submit to the arbitrator. Such a submission would require lay arbitrators to delve into whether or not the antitrust claims were foreclosed by the parties' Agreement.[59] Texaco argues that Hunt violated the Agreement by commencing this antitrust suit. The argument proceeds:

> "The issue before the arbitrators is not whether Hunt's customer provision claim may go forward. That unquestionably is a matter to be determined by this Court. Nor, of course, will the arbitrators be asked to determine the legality of the customer provision.
>
> "The question the arbitrators will have is whether someone may scheme to exact property from another by promising not to bring a potential claim and, once the property is given to him in reliance on his promise, turn around and bring the claim anyway and still retain the benefits of his broken promise."

(Continued from preceding page)

[59] An agreement to waive future anti-trust violations would be contrary to public policy. *Gaines v. Carollton Tobacco Bd. of Trade, Inc.*, 386 F.2d 757, 759 (6th Cir. 1967); *Fox Midwest Theatres, Inc. v. Means*, 221 F.2d 173, 180 (8th Cir. 1955); *Westmoreland Asbestos Co. v. Johns-Manville Corp.*, 39 F.Supp. 117, 119 (S.D.N.Y.1941), *aff'd*, 135 F.2d 844 (2d Cir. 1943). On the other hand, the Court of Appeals has held that arbitration of antitrust claims is "proper . . . [when] the agreement to arbitrate was made after the dispute arose." *Coenen v. R. W. Presswich & Co.*, 453 F.2d 1209, 1215 (2d Cir.), *cert. denied*, 406 U.S. 949, 92 S.Ct. 2045, 32 L.Ed.2d 337 (1972). *See also Cobb v. Lewis*, 488 F.2d 41, 48 (5th Cir. 1974).

We are not prepared to apply an Alice in Wonderland meaning to this language. It so manifestly indicates that Texaco does intend to present to and have the arbitrators pass upon the issues which are the very essence of one of plaintiff's antitrust claims that one wonders the argument was advanced.

Accordingly, the plaintiff's cross-motion for a stay of Texaco's proposed arbitration of the breach of contract claim is granted; the motion by the other defendants for a stay of proceedings of the fourth claim in this action is granted except insofar as the breach of contract claim alleged therein is relevant and pertinent under the first and second antitrust claims; further, those defendants, as well as Texaco, are stayed from proceeding to arbitration as to the breach of contract claim until the final determination of this action.

Since the fourth claim is the subject of a stay both in this action and in arbitration, it is unnecessary to pass upon the alternative motion for its dismissal or partial summary judgment thereon.

In conclusion, the defendants' motion to dismiss is denied as to the first and second claims; granted as to the third claim; and the respective motions as to the fourth claim are disposed of as indicated.

On Motion for Certification

Defendant Exxon and other defendants move for a certification under 28 U.S.C., section 1292(b) to permit them to apply to the Court of Appeals for leave to appeal from this Court's order of November 5, 1975, denying their motions to dismiss the first and second claims of the complaint.

On January 22, 1976, this Court granted plaintiff's application for a Rule 54 (b) order directing the entry of final judgment of dismissal of plaintiff's third claim upon the single legal issue of the applicability of the "act of state" doctrine to that claim. Defendants argue that "it would be inequitable to permit plaintiff an unconditional right of review while at the same time denying defendants an opportunity to apply for an appeal." Under these circumstances, they assert that "basic fairness favors the allowance of this motion."

However, as defendants are well aware, the criterion for certification under Rule 54(b) is simply that "there is no just reason for delay" for the entry of judgment, which affords an absolute right of appeal, while section 1292(b) imposes upon this Court the affirmative duty to certify that an otherwise non-appealable order it has made "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." Our Court of Appeals has admonished that, because of the "limited and exceptional character of the cases" to which section 1292(b) applies, the Court's "power must be strictly limited to the precise conditions stated in the law."[1]

Defendants urge that the conditions of section 1292(b) are fully satisfied by the presence in the instant case of "a controlling question of law as to which there is substantial ground for difference of opinion" concerning the applicability of either the "target area" doctrine or the "act of state"

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[1] *Gottesman v. General Motors Corp.*, 268 F.2d 194, 196 (2d Cir. 1959). *See also Milbert v. Bison Laboratories, Inc.*, 260 F.2d 431, 433 (3d Cir. 1958); *Sobel v. Hertz, Warner & Co.*, 338 F.Supp. 287, 299 (S.D.N.Y.1971).

doctrine to plaintiff's first and second claims. This Court does not agree. In its decision denying defendants' motion to dismiss as to these claims, this Court stated repeatedly that to apply either of these doctrines to bar plaintiff's first or second claim would be to "disregard the reality of the relationship of the parties and the allegations of the complaint."[2]

Plaintiff was found to have standing to raise these antitrust claims because he was "directly" in the "target area" of the defendants' allegedly unlawful activities. Defendants' reliance upon the recently decided *Long Island Lighting Company v. Standard Oil Company of California and Consolidated Edison Company of New York v. Standard Oil Company of California*,[3] which is reasserted in support of this motion, was rejected as "misplaced" since plaintiff, as a direct competitor of defendants, "was not merely 'incidentally' or 'remotely' affected by [the] provision[s] of the Libyan Producers' Agreement, as, for instance, one of his customers or creditors might have been."[4]

As to the applicability of the "act of state" doctrine, this Court held that:

> "[T]he concept has no bearing on plaintiff's first claim because resolution of the issues raised thereunder does not in any way require an inquiry into the judgment, the conduct or acts of the Libyan government, or any alleged conduct by the defendants which allegedly induced action by the Libyan government."[5]

Defendants' "act of state" contention was determined to be as "misdirected to [the second] claim as it was to the

[2] *Hunt v. Mobil Oil Corp.*, p. 19.
[3] 390 F.Supp. 1172 (S.D.N.Y.1975).
[4] *Hunt v. Mobil Oil Corp.*, p. 19.
[5] *Id.* p. 20.

first claim" since consideration of that claim also "does not require inquiry into the acts of Libya or any other foreign state."[6]

This Court is "of the opinion" that its order denying defendants' motion to dismiss as to plaintiff's first and second claims does not involve any controlling question of law "as to which there is substantial ground for difference of opinion."[7] Accordingly, under the strict admonition of the Court of Appeals to rigorously adhere to the precise conditions of section 1292(b), this Court perforce must deny defendants' motion without considering the tendered issue of "basic fairness" to or convenience of the movants.

[6] *Id.* p. 22.
[7] 28 U.S.C. § 1292(b).

APPENDIX M

Nelson Bunker HUNT, et al.,
Plaintiffs-Appellants,

v.

MOBIL OIL CORPORATION, et al.,
Defendants-Appellees.

No. 9, Docket 76-7052

United States Court of Appeals,
Second Circuit.

Argued Oct. 26, 1976.
Decided Jan. 12, 1977.

Before MULLIGAN and VAN GRAAFEILAND, Circuit Judges, and GAGLIARDI, District Judge.*

MULLIGAN, Circuit Judge.

This appeal raises the question whether the district court properly dismissed before trial, on the basis of the act of state doctrine, the third antitrust claim of the plaintiffs-

appellants' complaint seeking treble damages from the named defendants-appellees as the result of the nationalization of the plaintiffs' oil producing properties in the Sarir Field by the Libyan government on June 11, 1973. We hold that the motion to dismiss was correctly decided and affirm the judgment of the district court.

I

Nelson Bunker Hunt filed a complaint on March 3, 1975 in the United States District Court for the Southern District of New York charging in the first three counts that the named defendants had unlawfully combined and conspired to the damage of the plaintiff in violation of section 1 of the Sherman Act, 15 U.S.C. § 1, and section 73 of the Wilson Tariff Act, 15 U.S.C. § 8. A fourth claim alleged damages arising from a breach of contract. The complaint was amended by stipulation on January 9, 1976 adding as plaintiffs W. Herbert Hunt and Lamar Hunt. Hereinafter the plaintiffs are referred to as "Hunt." The complaint on the basis of the antitrust claims alone seeks damages of not less than $125 million before trebling. Prior to filing its answers containing denials, affirmative defenses and counterclaims, certain of the defendants (Mobil Oil Corporation, Texaco, Inc., Standard Oil Company of California, The British Petroleum Company (B.P.), Exxon Corporation, Gulf Oil Corporation, Occidental Petroleum Corporation and Grace Petroleum Corporation) moved to dismiss the first, second and third claims for lack of subject matter jurisdiction and for failure to state claims upon which relief could be granted, pursuant to Rule 12(b)(1) and (6) of the Federal Rules of Civil Procedure. These defendants also moved to dismiss the breach of contract

claim on grounds not relevant to this appeal. In an opinion, reported at 410 F. Supp. 10, filed on November 5, 1975, United States District Judge Edward Weinfeld denied the motion to dismiss the first and second antitrust claims but granted the motion to dismiss the third antitrust claim. The disposition of the breach of contract claim is covered in the trial court's opinion but is not here pertinent.

Thereafter, on January 22, 1976, Judge Weinfeld granted Hunt's motion for a final judgment dismissing the third claim as to all the defendants pursuant to Fed.R.Civ.P. 54(b) upon the express condition that the appeal be prosecuted with dispatch. A final judgment dismissing the third claim as to all defendants was entered on February 4, 1975, thus permitting this otherwise interlocutory appeal by Hunt.

In granting the Rule 54(b) motion, Judge Weinfeld stated, *inter alia*, that if the motion were denied, and thereafter on appeal from any judgment entered with respect to the first two claims the dismissal of the third claim was reversed, a duplicative lengthy trial would be required creating additional but unnecessary expense to the parties. He further found that this appeal would not delay the prospective trial nor would it interfere with the discovery process. We agree that on these grounds the motion was properly decided. Therefore, we reject the defendants' argument that this determination constituted an abuse of discretion, and consequently proceed to the merits of the appeal.

II

Hunt is a non-integrated independent producer of oil which in 1957 obtained an oil concession in Libya. The

seven major oil producers, who are included as defendants here, sometimes called "The Seven Sisters", are vertically integrated companies generally producing oil in both Libya and the Persian Gulf fields.[1] In November 1961, low sulphur oil was discovered in Libya at the Sarir Field, which eventually reached a level of 450,000 barrels a day shared equally by Hunt and B.P. which had a one-half undivided interest in the concession. In September 1969, Colonel Mu'ammar al-Qadhafi assumed power in Libya under a new government, the Revolutionary Command Council (RCC) which announced a policy of increasing the price of Libyan crude oil as well as the government's share or "take" in the price. The RCC's policy envisioned increased governmental control over production and production facilities. The heightened militancy of Libya resulted in agreements which were forced upon all the oil producers in Libya in September 1970, substantially increasing the take of the Libyan government in their profits. These agreements occasioned similar demands by the Persian Gulf countries which were members of the Organization of Petroleum Exporting Countries. That organization formulated a series of resolutions promulgated in December 1970 calling for more control by the producing nations over production. Despite the recently concluded agreements of Libya with its oil producers, the RCC demanded new increases in prices as well as taxes early in January 1971. The Libyan government

[1] The seven major oil producer defendants are Mobil Oil Corporation, Exxon Corporation, Shell Petroleum Corporation, Ltd., Texaco, Inc., Standard Oil Company of California, Ltd. and Gulf Oil Corporation. They explore for, produce and refine crude oil, transport both crude oil and refined petroleum products and market refined petroleum products. The bulk of their crude oil production (about 90%) is in the Persian Gulf area (Saudi Arabia, Iran, Iraq, Kuwait, Abu Dhabi, Qatar, Dubai and Oman). Gulf has no Libyan production. Defendants Occidential, Gelsenberg and Grace are diversified companies producing crude oil in Libya.

first moved against Hunt and Occidental making certain unilateral "non-negotiable" demands which had to be accepted prior to January 16, 1971 and which were at variance with existing agreements with those oil producers.

In an effort to present a united front and fearful that the Libyan policy would escalate the demands of the producing nations in the Persian Gulf area, the seven majors met secretly in January 1971 in New York City to structure their resistance to the demands of the oil producing countries. In light of their concerted activity and the antitrust implications it presented, the major oil companies sought and obtained a clearance letter from the Department of Justice which indicated that it had no present intention of bringing any antitrust action on condition that the independent Libyan oil producers be included in any joint action proposed. The independent producers, including Hunt, were thereupon invited to participate in the meetings with the majors. These meetings culminated in the drafting of a so-called "sharing arrangement" known as the Libyan Producers Agreement of January 15, 1971 (the Agreement) which was supplemented and amended on October 18 and December 16, 1971 and November 21, 1972. The Agreement in general provided that if any party's crude oil production in Libya was cut back as the result of government action, all other producers would share in the cutback on a proportionate basis. It further provided that if there was insufficient Libyan oil to meet contractual obligations to existing European or Western Hemisphere customers due to restrictions or a government shut-down, the Persian Gulf producers would supply the Libyan producers with Persian Gulf oil at cost, with an option to pay cash in lieu of oil at a nominal sum per barrel. At that time Hunt had three such customers, all of whom

were signatories to the Agreement and two of whom, Exxon and Shell, were among the seven majors. The Agreement as well as the subsequent amendments and supplements were reported to the antitrust division of the Department of Justice. Hunt was a party to the initial agreement and the subsequent modifications.

On December 7, 1971 the Libyan government nationalized B.P.'s half of the Sarir Field and demanded that Hunt market B.P.'s share of the Sarir production for Libya's account. Appellants allege that in response to the requests and assurances of B.P. and the other majors and in reliance upon the Agreement, Hunt refused the Libyan demand. As a result Libya evicted Hunt personnel from Sarir in early 1972 and cut back Hunt's permissible oil production by 50%. Hunt and B.P. as a consequence of these events received crude oil from the other parties to the Agreement. In October 1972, the Libyan government demanded an immediate 50% equity participation in Hunt's interests in Sarir. Hunt again rejected the Libyan demands. Hunt alleges that as a result of his non-cooperation with the Libyan demands, the Libyan government on December 11, 1972 refused to permit further export of Hunt's oil. On May 24, 1973 Libya terminated his right to produce and export crude oil and on June 11, 1973 pursuant to Law 42 of 1973 it nationalized all of Hunt's assets.

III

The sole issue on this appeal is whether the district court erred in dismissing the third antitrust claim of Hunt which

is set forth in the margin.[2] The gravamen of this claim is that the seven majors combined and conspired in violation of the Sherman and Wilson Tariff Acts to preserve the competitive advantage of Persian Gulf crude oil over that of Libyan crude oil and to diminish competition from Libyan crude oil producers. The mechanism employed is alleged to be the Agreement which precluded Hunt from reaching any settlement with Libya inconsistent with the competitive advantage of the defendants and through which the defendants

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THIRD CLAIM

[61] Plaintiff Hunt realleges each and every allegation contained in paragraphs 1 through 45.

[62] Since at least 1970, the seven majors along with co-conspirators named and not named, have engaged in a combination and/or conspiracy in unreasonable restrain of the foreign trade and commerce of the United States, in violation of the Sherman Act, 15 U.S.C. § 1, and of Section 73 of the Wilson Tariff Act, 15 U.S.C. § 8.

[63] As part of the unlawful conduct complained of, the seven majors have combined and conspired among themselves to preserve the competitive advantage of Persian Gulf crude oil relative to that of Libyan crude oil, and to diminish competition from Libyan crude oil producers. To these ends they have combined and conspired to prevent plaintiff Hunt and other Libyan producers from reaching any agreement with the Libyan government inconsistent with that competitive advantage, even where they knew that the necessary and foreseeable consequences of their conduct would be Hunt's elimination as a Libyan crude oil producer.

[64] In furtherance of this unlawful combination and conspiracy, the seven majors entered into written agreements with Hunt and other Libyan producers, manipulated the course of Libyan negotiations so as to advance their own interests in the Persian Gulf, and followed a course of action that led to Hunt's nationalization and elimination from the production of Libyan crude oil.

[65] By reason of this unlawful combination and conspiracy, Hunt has been and will continue to be injured in his business and property. He has sustained damages, the full extent of which cannot presently be calculated, but which include lost profits on his half interest in the 11 billion barrels of crude oil contained in the Sarir Field.

manipulated Hunt's dealings with Libya to the extent that Hunt was eventually nationalized, suffering substantial loss of profits as well as other unspecified damage.

Hunt's complaint does not name Libya as a defendant or in any way suggest that it is a co-conspirator of the named defendants. Nonetheless Judge Weinfeld reasoned that the combination or conspiracy charged did not of itself cause the damage complained of but rather that the damage resulted from the action of Libya in cutting back Hunt's production, shutting off its oil and finally nationalizing its properties. Thus he found that Hunt would be required to establish that *but for* the conspiracy Libya would not have committed any of these aggressive actions. This he decided would require judicial inquiry into "acts and conduct of Libyan officials, Libyan affairs and Libyan policies with respect to plaintiff's as well as other oil producers' properties and the underlying reasons for the Libyan government's actions." 410 F.Supp. at 24. He concluded that this inquiry was foreclosed under the act of state doctrine.

IV

The appellants have vigorously attacked the application of the act of state doctrine to the facts pleaded in its third claim. Whatever great expectations appellants may have anticipated from the Supreme Court's decision in *Alfred Dunhill of London v. Republic of Cuba*, 425 U.S. 682, 96 S.Ct. 1854, 48 L.Ed2d 301 (1976), which was decided after the decision below was rendered, have been blighted. *Dunhill* reaffirmed the doctrine in traditional terms, announcing that it " 'precludes the courts of this country from inquiring into the validity of the *public* acts a recognized foreign sovereign

power committed within its own territory.' *Banco Nacional de Cuba v. Sabbatino* [376 U.S. 398, 84 S.Ct. 923, 11 L.Ed.2d 804] . . . and that it applies to 'acts done within their own states, in the exercise of *governmental* authority.' *Underhill v. Hernandez* [168 U.S. 250, 18 S.Ct. 83, 42 L.Ed. 456]. . . ." Id. at 1867. The majority opinion of Mr. Justice White in *Dunhill* underscored "public" and "governmental" since the act complained of there, the failure of Cuba to return to petitioner Dunhill certain funds paid to a Cuban government-controlled corporation for cigars sold to Dunhill by this Cuban cigar business before government seizure, was found to be an act of the sovereign committed in the course of a purely commercial operation.[3] *Dunhill* declined to extend the act of state doctrine to situations where the sovereign has descended to the level of an entrepreneur. Appellants conceded on the oral argument of this appeal that the nationalization of Hunt's properties was not a purely commercial act within the *Dunhill* exception. Expropriations of the property of an alien within the boundaries of the sovereign state are traditionally considered to be public acts of the sovereign removed from judicial scrutiny by application of the act of state rubric. Indeed such action as that taken here by Libya is cited in *Dunhill* as an example of non-commercial sovereign activity within the ambit of the doctrine. See 425 U.S. at 704, 96 S.Ct. at 1866.

Any possible doubt about this issue is in any event removed since upon the seizure of Hunt's property on June 11, 1973 President al-Qadhafi announced "[W]e proclaim loudly that this United States needs to be given a big hard blow in the Arab area on its cold, insolent face. . . . The time has

[3] The dissenting opinion of Mr. Justice Marshall with whom Justices Brennan, Stewart and Blackmun joined would have held the acts complained of within the proscription of the act of state doctrine. 96 S.Ct. at 1871.

come for the Arab peoples to confront the United States, the time has come for the U.S. interests to be threatened earnestly and seriously in the Arab area, regardless of the cost."[4] The note of the United States to the Libyan government on July 8, 1973 in response both to the seizure and the public statements of Libya concerning it, characterized the expropriation as "political reprisal against the United States Government and coercion against the economic interest of certain other U.S. nationals in Libya."[5] We conclude that the political act complained of here was clearly within the act of state doctrine and that since the disputed pleadings inevitably call for a judgment on the sovereign acts of Libya the claim is non-justiciable.

V

In finding the doctrine applicable to the pleadings in issue Judge Weinfeld placed principal reliance upon *American Banana v. United Fruit Co.*, 213 U.S. 347, 29 S.Ct. 511, 53 L.Ed. 826 (1909), a decision dubbed by appellants as an artifact and museum piece of no precedential value. In *American Banana* the plaintiff sued for treble damages under the Sherman Act alleging that his banana plantation had been seized and his business destroyed by the confiscatory

[4] Statement of the State Department, Hearings before the Subcomm. on Multinational Corporations of the Senate Comm. on Foreign Relations, 93rd Cong., 2d Sess., pt. 6, at 316-17 (1974). The commentary that accompanied Libya's Law 42 of 1973 that effectuated the seizure described the act as "a warning to the United States to end its recklessness and hostility to the Arab nation." It further stated that, "In view of . . . American impudence and the continued disregard for Arab rights and destinies, it was necessary to strike a blow against U.S. policy. . . ." A. Rovine, Digest of United States Practice in International Law 1973 at 334.

[5] A. Rovine, Digest of United States Practice in International Law 1973 at 335.

acts of the Costa Rica government, which had acted at the defendant's instigation in furtherance of his anti-competitive behavior. The Supreme Court, in an opinion authored by Mr. Justice Holmes, held, in reliance on *Underhill v. Hernandez*, 168 U.S. 250, 18 S.Ct. 83, 42 L.Ed. 456 (1897), that since the seized plantation was within the de facto jurisdiction of Costa Rica, its seizure by that state was an act of sovereign power which could not be litigated in our courts. The opinion further held that since the acts complained of occurred outside of the United States they were beyond the jurisdictional scope of the Sherman Act.[6]

There can be no question that as to this latter facet of the opinion, the extraterritorial sweep of the Sherman Act, *American Banana* is no longer a viable precedent. This aspect of the case has been explicitly rejected by later Supreme Court cases which hold that, "A conspiracy to monopolize or restrain the domestic or foreign commerce of the United States is not outside the reach of the Sherman Act just because part of the conduct complained of occurs in foreign countries." *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 704, 82 S.Ct. 1404, 1413, 8 L.Ed.2d 777 (1962); *United States v. Sisal Sales Corp.*, 274 U.S. 268, 276, 47 S.Ct. 592, 71 L.Ed. 1042 (1927). Hence, we agree with appellants that the Sherman Act is applicable to the cause pleaded in the third claim. However, the fact that the court has jurisdiction does not make the issue justiciable. *First National City Bank v. Banco Nacional de Cuba*, 406

[6] Appellants argue that Mr. Justice Holmes had a uniquely narrow view of the Sherman Act. His disaffection for that legislation needs little documentation. E. g., Letter from Justice Holmes to Harold J. Laski, March 4, 1920, in 1 Holmes-Laski Letters 248-49 (1953 ed. M. Howe). However, the comment is not really germane. The unanimous opinion of the Court is hardly suspect because of the possible animus of its author. In any event, as we shall develop, the antitrust and act of state elements of the decision are distinct.

U.S. 759, 773-74, 92 S.Ct. 1808, 32 L.Ed.2d 466 (1972) (Powell, J., concurring). Were the Sherman Act not applicable here we would never reach the act of state doctrine which is a manifestation of judicial abstention.

Appellants argue that both *Sisal* and *Continental Ore*, *supra*, overturned *American Banana's* application of the act of state doctrine. Not so. *American Banana* on this point rested on *Underhill v. Hernandez*, *supra*, and the classical definition of the act of state doctrine there was reiterated much later in both *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 416, 84 S.Ct. 923, 11 L.Ed.2d 804 (1964) and *Alfred Dunhill of London v. Republic of Cuba*, *supra*, 96 S.Ct. at 1859 n.7, so that it can hardly be consigned to the oblivion that appellants consider it richly deserves.

In *Sisal* the antitrust complaint alleged a conspiracy among American bankers and corporations dealing in sisal, a plant fiber used to make twine, and a Mexican corporation which purchased that product from local producers in the Yucatan, the major source of sisal. The Mexican company became the sole purchaser of sisal and laws were solicited and enacted in both Mexico and the Yucatan which allegedly gave it advantages over all other competitors. One of the American companies then became the exclusive selling agent of the Mexican corporation in all the world markets thus permitting the defendants to acquire complete dominion over the market obtaining the power to fix prices and eliminate competition, the classic hallmarks of the section 2 violation. Mr. Justice McReynolds' opinion distinguishes *American Banana* on the Sherman Act issue, pointing out that the act of seizure committed there was performed in Costa Rica while in *Sisal* the conspiracy took place in the United States and was made effective by acts performed here. Although the

act of state doctrine was raised by one of the appellees (represented by a certain Harold R. Medina) the Court makes no specific mention of the doctrine. Although it cites *American Banana's* proposition that a "seizure by a state is not a thing that can be complained of elsewhere in the courts", it found that circumstances in *Sisal* were "radically different" from those in *American Banana* even though the conspirators were "aided by discriminatory legislation." 274 U.S. at 276, 47 S.Ct. 592. While Mr. Justice McReynolds characterized the plaintiff's pleading in *Sisal* as "confused, difficult to follow and as an excellent example of bad pleading" the opinion itself is hardly as clear as a mountain lake in springtime. It is clear however that it does not purport to overrule *American Banana's* act of state holding and that it considered the assistance of the sovereign through the mechanism of favorable legislation engineered by the defendants to be of considerably less moment than the expropriation by the state of the plaintiff's properties in the earlier case.[7] In any event, we deem it to be of no value to the appellants except on the jurisdictional thrust of the Sherman Act which, as we have pointed out, has been confirmed by later cases and is not disputed here.

Continental Ore Co. v. Union Carbide & Carbon Corp., *supra*, we find to be of no assistance to the appellants on the act of state issue. The antitrust violation there asserted involved two American corporations and several subsidiaries (including a Canadian subsidiary) of one of these corporations which had succeeded in monopolizing 99% of the

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[7] Most commentators have also concluded that *American Banana's* precedential value on the act of state doctrine was undiminished by *Sisal* or any other case cited for that proposition by appellants. E. g., A.B.A., Antitrust Developments 365 (1975); K. Brewster, Antitrust and American Business Abroad 97 (1958); W. Fugate, Foreign Commerce and the Antitrust Laws § 2.21 (1973).

vanadium market in the United States. The Canadian defendent, Electro Met of Canada, was an agent of the Canadian government and, while such, excluded the plaintiff Continental from the Canadian market, dividing its former share between two of the defendants. The Court found:

> [T]here is no indication that the [Metals] Controller or any other official within the structure of the Canadian Government approved or would have approved of joint efforts to monopolize the production and sale of vanadium or directed that purchases from Contiental be stopped. . . . Respondents are afforded no defense from the fact that Electro Met of Canada in carrying out the bare act of purchasing vanadium from respondents rather than Continental, was acting in a manner permitted by Canadian law. There is nothing to indicate that such law in any way compelled discriminatory purchasing, and it is well settled that acts which are in themselves legal lose that character when they become constituent elements of an unlawful scheme.

Id. 370 U.S. at 706-07, 82 S.Ct. at 1414. Since no act of the sovereign was involved in *Continental Ore* there is nothing in that case to disturb *American Banana's* holding on the act of state doctrine. It is simply not the law that merely because the action is based on the antitrust laws, the act of state doctrine is to be discarded.[8]

[8] Appellants also contend that *American Banana* is inapplicable because Hunt relies on not only the Sherman Act but also the Wilson Tariff Act which "was not in existence when *American Banana* was decided." Since the antitrust provision of the Wilson Tariff Act was initially enacted in 1894, Act of Aug. 27, 1894, c. 349, § 73, 28 Stat. 570, in substantially the same language as appears presently, 15 U.S.C. § 8, the argument is fallacious. In any event, this argument only relates to jurisdiction and does not affect the act of state issue. In so far as the substantive antitrust provisions of the Wilson Tariff Act are concerned, they follow the same pattern as the Sherman Act, *United States v. Cooper Corp.*,

VI

The appellants contend that the act of state doctrine cannot be applicable here because Libya is not named as a defendant, is not designated as a co-conspirator and in fact "was as much a victim of the conspiracy as was Hunt." Hence appellants inform us that we are not called upon here to sit in judgment upon the acts of Libya. Thus they argue that the third count of their complaint is not within any of the cases which have applied the doctrine. A similar argument was raised in *Occidental Petroleum Corp. v. Buttes Gas & Oil Co.*, 331 F.Supp. 92 (C.D. Cal. 1971), aff'd per curiam, 461 F.2d 1261 (9th Cir.), cert. denied, 409 U.S. 950, 221 S.Ct. 272, 34 L.Ed.2d 221 (1972) relied upon by Judge Weinfeld below as a case which involved facts substantially parallel to those in the instant case. 410 F.Supp. at 24. *Occidental* involved an alleged antitrust conspiracy to restrain and monopolize the exploration, development and exploitation of petroleum reserves in the territorial waters of the Trucial States. The defendants were accused, *inter alia*, of having procured and induced the Ruler of Sharjah for his personal gain to assert dominion over certain territory within a concession area awarded to the plaintiffs by another Trucial State, Umm al Qaywayn. The plaintiffs in that case raised the same argument raised here — that they were complaining not of the acts of a foreign state but only of those of the named defendants in catalyzing them. However, the court indicated that the plaintiffs had characterized the foreign sovereigns there involved as co-conspirators, an appellation studiously avoided

(Continued from preceding page)

312 U.S. 600, 608, 61 S.Ct. 742, 85 L.Ed. 1071 (1941); see W. Fugate, Foreign Commerce and the Antitrust Laws § 13.2 (2d ed. 1973).

in the case before us. Moreover, in that case the plaintiffs would have been required to establish that Sharjah had issued a fraudulent territorial waters decree. 331 F.Supp. at 110. Here it is urged that Hunt makes no claim that Libya acted illegally at all, simply that as a matter of fact its "lawful" act was induced by the unlawful conduct of the named defendants.[9] While we agree that these points serve to distinguish *Occidental* from the case before us, the distinctions proffered are of no substance and do not affect the disposition of this case.

First: The excision of the government of Libya from the pleadings as a defendant or con-conspirator does not eliminate its action as a necessary element in the clause pleaded in the third claim. Hunt has pleaded that he was damaged as the result of Libyan action in cutting back his production and eventually nationalizing his properties.[10] It is well established that a private plaintiff who seeks damages in an antitrust action must allege and establish that his business or property was injured as a direct result of the Sherman Act violation. *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*, 364 U.S. 656, 660, 81 S.Ct. 365, 5 L.Ed.2d 358 (1961); *Salerno v. American League of Professional Baseball Clubs*, 429 F.2d 1003, 1004 (2d Cir. 1970), cert. denied, 400 U.S. 1001, 91 S.Ct. 462, 27 L.Ed.2d 452 (1971).

Appellants do not deny, as they cannot, this proposition of law. Instead, they argue that while Hunt must prove

[9] *Occidental* in fact supports the holding below and the discussion here on the vitality of *American Banana*. Thus the court, while recognizing that the restrictive view of Mr. Justice Holmes in *American Banana* as to the territorial reach of the Sherman Act has not survived subsequent Supreme Court holdings, found that the act of state holding there applied has endured unscathed. 331 F.Supp. at 109-10.

[10] ¶¶ 34, 40, 41 of the complaint.

a causal connection between Libya's nationalization and the conspiracy charged this has been sufficiently pleaded and somehow this shields the third claim from dismissal prior to trial.[11] However, appellants admit that antitrust liability cannot be attributed to the defendants unless Hunt can prove that *but for* their combination or conspiracy Libya would not have moved against it. Since this nexus is at the heart of the claim we do not understand how Judge Weinfeld could have erred in anticipating that the doctrine of act of state was inescapably raised by the pleadings and thus was a major issue appropriately considered on the motion to dismiss.

Second: Appellants' argument that by their not challenging the propriety of Libya's action and by not asserting that Libya violated either international law or America antitrust law, the judicial branch of government is not required to sit in judgment of the act of the foreign sovereign is, upon analysis, superficial and not legally sufficient. It is true that traditional and textbook definitions of the act of state doctrine provide that courts in the

[11] Appellants urge on appeal that the interpretation of the third claim below was unduly narrow since ¶ 63 of the complaint, *supra*, note 2, also charged that the defendants conspired to preserve the competitive advantage of Persian Gulf crude oil over that of Libyan and thus to diminish competition by preventing Hunt from reaching any agreement with the Libyan government inconsistent with that advantage. However, Hunt's first claim which alleges a conspiracy among the defendants in violation of both the Sherman and Wilson Tariff Acts states in ¶ 50(b) of the complaint that the major producers took steps to restrain competition by, "Negotiation and administration of the Libyan Producers' Agreement so as to disadvantage Libyan oil relative to Persian Gulf oil." That claim was not discussed and Hunt is therefore not precluded from raising the issue at trial. Judge Weinfeld specifically found the act of state doctrine unavailable to the defendants on this count. 410 F.Supp. at 20-21.

United States are precluded from inquiring into the validity of the public acts of the foreign sovereign committed in its own territory. E. g., *Alfred Dunhill of London v. Republic of Cuba, supra*, 96 S.Ct. at 1863; *Frazier v. Foreign Bondholders Protective Council*, 283 App.Div. 44, 125 N.Y.S.2d 900, 903 (1st Dept. 1953); W. Fugate, Foreign Commerce and the Antitrust Laws § 2.21 at 81-82 (2d ed. 1973). However, while the skilled pleader here has meticulously attempted to avoid the issue of validity, its claim is admittedly not viable unless the judicial branch examines the motivation of the Libyan action and that inevitably involves its validity. Thus the State Department note of July 8, 1973 in response to the Libyan seizure of Hunt's properties after determining that the reasons for Libya's action were political reprisal against the United States government and economic coercion against other U.S. nationals in Libya concluded:

> Under established principles of international law, measures taken against the rights and property of foreign nationals which are arbitrary, discriminatory, or based on consideration of political reprisal and economic coercion are invalid and not entitled to recognition by other states.

A. Rovine, Digest of United States Practice in International Law 1973 at 335.

In sum, the United States has officially characterized the motivation of the Libyan government, the very issue which Hunt now seeks to adjudicate here. The attempted transmogrification of Libya from lion to lamb undertaken here does not succeed in evading the act of state doctrine because we cannot logically separate Libya's motivation from the validity of its seizure. The American judiciary is being

asked to make inquiry into the subtle and delicate issue of the policy of a foreign sovereign, a Serbonian Bog, precluded by the act of state doctrine as well as the realities of the fact finding competence of the court in an issue of far reaching national concern.

Mr. Justice Harlan, in analyzing the act of state doctrine in *Banco Nacional de Cuba v. Sabbatino, supra*, 376 U.S. at 423, 84 S.Ct. at 938, observed:

> It arises out of the basic relationships between branches of government in a system of separation of powers. It concerns the competency of dissimilar institutions to make and implement particular kinds of decisions in the area of international relations. The doctrine is formulated in past decisions expresses the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder rather than further this country's pursuit of goals both for itself and for the community of nations as a whole in the international sphere.

The *Dunhill* majority has reiterated this view:

> The major underpinning of the act of state doctrine is the policy of foreclosing court adjudications involving the legality of acts of foreign states on their own soil that might embarrass the Executive Branch of our Government in the conduct of our foreign relations.

Alfred Dunhill of London v. Republic of Cuba, supra, 96 S.Ct. at 1863.

The act of state rubric then is perceived by the Supreme Court as a judicial articulation of the separation of powers doctrine and its application here is particularly appropriate since the executive branch has already determined the validity of the very act *sub judice* and has

necessarily identified its motivation. Another inquiry could only be fissiparous, hindering or embarrassing the conduct of foreign relations which is the very reason underlying the policy of judicial abstention expressed in the doctrine in issue.[12] Even if the Department of State had not spoken, the inquiry required by the third claim in this private litigation is hardly within the fact finding competence of the judicial branch.[13] Appellants claim that but for the conspiracy pleaded, Hunt's business would have continued to thrive and its properties would have remained unscathed and intact. This necessarily would require a wholesale examination of Libyan policy — how did it treat other companies, what provoked its "displeasure," how far could concessions by Hunt appease President al-Qadhafi.[14] The

[12] The importance of a unified national voice on foreign policy has been recognized since the founding of the republic. See The Federalist No. 42 (J. Madison). The judiciary, even when it has had jurisdiction, has traditionally been reluctant to infringe on the executive's authority in the area of foreign affairs. This has resulted in the application of the political question doctrine to find such issues non-justiciable. See *Baker v. Carr*, 369 U.S. 186, 211-13, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962).

[13] See *Holtzman v. Schiesinger*, 484 F.2d 1307, 1310-11 (2d Cir. 1973), cert. denied, 416 U.S. 936, 94 S.Ct. 1935, 40 L.Ed.2d 286 (1974), and *Mitchell v. Laird*, 159 U.S.App.D.C. 344, 488 F.2d 611, 616 (1973), which emphasize the difficulty of a judicial tribunal in making determinations of political and diplomatic dimensions in the arena of foreign affairs, an area entrusted to the discretion of the President and the Department of State.

[14] Our dissenting brother parts company with us when we say that in order to prove their damages, plaintiffs will be required to establish the motivation for the Libyan expropriation and that this inevitably involves its validity. He further argues that Libya is shielded from antitrust liability. We agree that Libya cannot be guilty of a Sherman Act violation. This is certainly so here since it is not a party and, in any event, it could not be because it not a person or corporation within the terms of the Act but a sovereign state. *Interamerican Refining Corp. v. Texaco Maracaibo, Inc.*, 307 F.Supp. 1291, 1298 (D.Del.1970); Fugate, Antitrust Jurisdiction and Foreign Sovereignty, 49 Va.L.Rev. 925, 932 (1962); K.

action taken here is obviously only an isolated act in a continuing and broadened confrontation between the East and West in an oil crisis which has implications and complications far transcending those suggested by appellants. To dismiss this examination as an issue of fact and not of law and therefore beyond the ambit of the act of state doctrine is, in our view, neither conceptually nor pragmatically sound.

VII

Appellants urge finally, and perhaps ineluctably, that if the act of state doctrine as traditionally applied by the courts is found here applicable, it be redefined so that it would solely be utilized where a determination of the legality of the for-

(Continued from preceding page)

Brewster, Antitrust and American Business Abroad 94 (1958). (There is no claim here that Libya was performing a purely commercial act.) When we have discussed the "validity" of the act of confiscation we are not using the term in an antitrust sense but rather in an international law context. The plaintiffs admittedly can only succeed if they establish the motivation of Libya in making the seizure. The United States has characterized it as an act of political reprisal. We are now asked to determine that Libya would not have so acted had it not been for the conspiracy of the defendants. As recently indicated in *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597 (9th Cir. 1976), "We wish to avoid 'passing on the validity' of foreign acts. *Sabbatino*, 376 U.S. at 423 [, 84 S.Ct. 923]. Similarly, we do not wish to challenge the sovereignty of another nation, the wisdom of its policy, or the integrity and motivation of its action." See The Restatement, Second, Foreign Relations Law of the United States, § 41 (1965), "[A] court in the United States . . . will refrain from examining the validity of an act of a foreign state by which that state has exercised its jurisdiction to give effect to its public interests."

The dissent also urges that Libya's authorization, approval, encouragement or participation in restrictive private conduct confers no antitrust immunity on the wrongdoer. But this is not a case of Libyan participation in antitrust wrongdoing. The complaint is rather that Libya like Hunt was a "victim" of the conspiracy.

eign sovereign's action is the issue. As we have already discussed, the issue of legality cannot be isolated from the issue of motivation of the foreign sovereign. Appellants here have recognized and, indeed, cited the State Department position on the seizure of Hunt's properties. Counsel has argued that a reversal of *Sabbatino by Dunhill*, which at the time of the briefing of this appeal was pending before the Supreme Court, would enable this court to examine the Libyan nationalization "uninhibited by the act of state doctrine." Appellant's reply brief at 16. But *Dunhill* has since been decided, Hunt is not within its purely commercial exception and *Sabbatino* remains unblemished, relied on and cited by both the majority and dissenting opinions. *Alfred Dunhill of London v. Republic of Cuba, supra*, 96 S.Ct. at 1866-67; id. at 1878 (Marshall, *J.*, dissenting).

In *Banco Nacional de Cuba v. Sabbatino, supra*, 376 U.S. at 428, 84 S.Ct. 923, Mr. Justice Harlan demurred from establishing any inflexible or all-encompassing rule in act of state cases. A fortiori it is not for this inferior court to undertake the task. This is particularly so since our holding is compelled by the separation of powers underpinning of the doctrine. Furthermore, the distinction sought to be engrafted would, in effect, result not in the doctrine's redefinition but its extirpation, thus stripping the judiciary of an invaluable tool needed on occasion to ease the friction between the departments.

Appellants emphasize that the court below noted both in its decision on the pleadings and its certification of this appeal that the recent disclosures of bribes and payoffs by multi-national corporations to foreign officials warrant consideration in the public interest of the continued viability of the act of state doctrine. While we have already found

that there was no abuse in the certification here on the grounds we have mentioned, *supra*, part I, we respectfully disagree with the proposition that "scandalous payoffs" to foreign potentates or their janizaries provide any basis at all for reconsideration of the doctrine in this case. There is no allegation express or implied here that representatives of Libya were seduced or enticed in any manner by the payment of bribes or boodle to take the action complained about. On the contrary, as we have stated, Libya is depicted as the innocent dupe of a domestic conspiracy. This appeal therefore is not the proper vehicle for consideration of international commercial bribery in so far as it affects the act of state doctrine.

For all these reasons we affirm the dismissal of the third claim of the complaint.

VAN GRAAFEILAND, Circuit Judge, dissenting:

While I am far from convinced that plaintiffs, given the opportunity, would have been able to establish the cause of action which was dismissed, the possible precedential impact of the majority's opinion prompts me to briefly record my dissent.

The "classic" definition of the act of state doctrine, reiterated by the Supreme Court in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 416, 84 S.Ct. 923, 11 L.Ed.2d 804 (1964) and *First National City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 763, 92 S.Ct. 1808, 32 L.Ed.2d 466 (1972), is found in *Underhill v. Hernandez*, 168 U.S. 250, 252, 18 S.Ct. 83, 84, 42 L.Ed. 456 (1897), where the court said:

> Every sovereign state is bound to respect the independence of every other sovereign state, and the courts

> of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.

Despite the broad language of this accepted definition, the doctrine does not purport to set up a jurisdictional bar to judicial review. *Ricaud v. American Metal Co.*, 246 U.S. 304, 309, 38 S.Ct. 312, 62 L.Ed. 733 (1918). Neither does it prohibit judicial scrutiny of the conduct of foreign officials. Indeed, the very assertion of an act of state defense requires the court to examine into the nature of the conduct complained of and its relationship to the foreign sovereign. *See Alfred Dunhill of London, Inc. v. Republic de Cuba*, 425 U.S. 682, 96 S.Ct. 1854, 48 L.Ed.2d 301 (1976); *Banco de Espana v. Federal Reserve Bank*, 114 F.2d 438 (2d Cir. 1940). Federal courts have not hesitated to receive evidence concerning the acts of foreign officials and the role played by American citizens in motivating such acts. *See, e. g., United States v. Lira*, 515 F.2d 68 (2d Cir.), *cert. denied*, 423 U.S. 847, 96 S.Ct. 87, 46 L.Ed.2d 69 (1975); *United States v. Cotten*, 471 F.2d 744, 746 n.4 (9th Cir.), *cert. denied*, 411 U.S. 936, 93 S.Ct. 1913, 36 L.Ed.2d 396 (1973); *Stonehill v. United States*, 405 F.2d 738 (9th Cir. 1968), *cert. denied*, 395 U.S. 960, 89 S.Ct. 2102, 23 L.Ed.2d 747 (1969). The proscription of the doctrine is against judicial determination of the validity of the acts of a foreign sovereign, *Alfred Dunhill of London, Inc. v. Republic of Cuba, supra*, 425 U.S. at 697, 706, 96 S.Ct. 1854; *Banco Nacional de Cuba v. Sabbatino, supra*, 376 U.S. at 428, 84 S.Ct. 923, and judicial redress of grievances predicated upon a finding of invalidity. *Underhill v. Hernandez, supra*, 168 U.S. at 252, 18 S.Ct. 83.

It is difficult to anticipate what plaintiffs' proof would have been in this case, because the district court dismissed their

cause of action, under Fed.R.Civ.P. 12(b)(1), for failure to state a claim on which relief could be granted. However, plaintiffs' contention appears to be that the Libyan Producers' Agreement was used by the defendants to impose competitive disadvantages upon the independent oil producers and to prevent them from reaching an agreement with Libya which would have been adverse to the defendants' Persian Gulf interests. Plaintiffs argue that they were induced thereby to reject Libyan demands in order that defendants could negotiate more favorable terms for their Persian Gulf wells and that, because of defendants' illegal conduct, they were caused to take a position in their own dealings with Libya which resulted in the nationalization of their interests.

Although plantiffs make no claim of wrongdoing upon the part of the Libyan government in effecting the expropriation of their property, my brothers reject this concession to Libyan sensibilities. They say that, in order to prove damages, plaintiffs will be required to establish expropriation and that this inevitably involves validity. It is at this point that my brothers and I part company.

In *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 592, 96 S.Ct. 3110, 49 L.Ed.2d 1141 (1976), the Supreme Court made it clear that "state authorization, approval, encouragement, or participation in restrictive private conduct confers no antitrust immunity" upon the wrongdoer. The Court's citation of *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 82 S.Ct. 1404, 8 L.Ed.2d 777 (1962) indicates that this rule applies in both foreign and domestic states.[1] At the

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[1] The Court's reference to *Continental* as an example of state "participation" indicates that it reads its decision in *Continental* differently than do my brothers, who find no act of the sovereign to have been involved in that case.

same time, the state itself is guilty of no wrongdoing under the Sherman Act because of the role which it plays. *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943).

In the instant case, as Judge Mulligan correctly observes, plaintiffs have the burden of establishing causal relation between the private violations alleged and the injuries suffered. *Salerno v. American League of Professional Baseball Clubs*, 429 F.2d 1003 (2d Cir. 1970), *cert. denied*, 400 U.S. 1001, 91 S.Ct. 462, 27 L.Ed.2d 452 (1971).[2] However, under the teaching of *Cantor* and *Parker*, *supra*, plaintiff's success in this effort does not entail a finding that the acts of the Libyan government were invalid.

In *Continental Ore Co. v. Union Carbide & Carbon Corp.*, *supra*, 370 U.S. at 704, 82 S.Ct. at 1412, the Court rejected as erroneous the Court of Appeals' holding that "such efforts as appellants claim defendants took to persuade and influence the Canadian Government" were not within the purview of the Sherman Act. The Court said that appellants' offer of proof on this issue "presented an issue for the jury's resolution as to whether the loss of Continental's Canadian business was occasioned by respondents' activities." *Id.* at 706, 82 S.Ct. at 1414.

The defendants in *Continental*, as in the instant case, relied upon *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 29 S.Ct. 511, 53 L.Ed. 826 (1909) to shield them from

[2] In *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 114 n. 9, 89 S.Ct. 1562, 1571, 23 L.Ed.2d 129 (1969) the Court said:

> It is enough that the illegality is shown to be a material cause of the injury; a plaintiff need not exhaust all possible alternative sources of injury in fulfilling his burden of proving compensable injury under § 4.

liability. Referring to *American Banana*, the Court said, 370 U.S. at 704, 82 S.Ct. at 1413:

> This Court there held that an antitrust plaintiff could not collect damages from a defendant who had allegedly influenced a foreign government to seize plaintiff's properties. But in the light of later cases in this Court respondent's reliance upon *American Banana* is misplaced.

I find appellees' reliance upon *American Banana* here to be equally misplaced. If the validity of the conduct of a foreign government is not placed in issue, its participation in the wrongdoing of individual defendants should not be permitted to screen the latter from accountability for their illegal acts.[3]

Domestic corporations play a variety of roles in the affairs of foreign nations, some of which may be forbidden under our laws. Where, as here, the wrong complained of is the role played rather than the possible political reaction thereto, I think it wrong to predicate an act of state defense upon the face of the pleadings. A complaint "should not be dismissed for failure to state a claim unless it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957).

I would reverse the order dismissing the third claim of the complaint.

[3] In *Occidental Petroleum Corp. v. Buttes Gas & Oil Co.*, 331 F.Supp. 92 (C.D.Cal.1971), *aff'd per curiam*, 461 F.2d 1261 (9th Cir.), *cert. denied*, 409 U.S. 950, 93 S.Ct. 272, 34 L.Ed.2d 221 (1972), relied upon by the majority, the complaint alleged that the ruler of Sharjah, at the instigation of defendants, falsely asserted a claim to certain off-shore drilling areas not within its territorial waters. Since plaintiffs' claim was premised upon this assertion of wrongdoing and called into question the location of Sharjah's territorial boundaries. I find this case clearly distinguishable from the one before us.